80-1714

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ALEXANDER L. STEVAS,
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT G. BRITTON, Commissioner,
Alabama Department of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Petitioners

v.

JOHN LOUIS EVANS, III,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Beck v. Alabama, 100 S. Ct. 2382 (1980), require the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of Bellotti v. Baird, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

PARTIES

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OPINIONS BELOW

1. The opinion of the United States Court for the Southern District of Alabama, denying Respondent Evans' petition for a writ of habeas corpus is reported as Evans v. Birtton,[1] 472 F. Supp. 707 (S.D. Ala. 1979), and is submitted as Appendix I, hereto, pp. 46a - 134a, infra.[2]

2. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the district court's denial of Evans' petition, is reported as Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), and is submitted as Appendix C, hereto, pp. 15a - 22a, infra.

3. The extension of the opinion of the United States Court of Appeals for the Fifth Circuit, in denying rehearing, is

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[1]The caption of the published district court opinion misspells the name of Robert G. Britton, the Commissioner of the Alabama Department of Corrections.

[2]The appendices to this petition are separately bound pursuant to Rule 21.1(k).

not yet published but is submitted as Appendix B, hereto, pp. 3a - 14a, infra.

JURISDICTION

The judgment and initial opinion of the United States Court of Appeals for the Fifth Circuit was issued on October 15, 1980. See Appendix A, p. 1a, infra, and Appendix C, p. 15a, infra. The opinion was extended and rehearing denied on March 9, 1981. See Appendix B, pp. 3a - 14a, infra.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

1. 28 U.S.C. § 2254, which is reproduced as Appendix J, hereto, pp. 129a - 134a, infra.

2. Alabama Rule of Appellate Procedure 18, which is reproduced as Appendix E, hereto, pp. 30a - 33a, infra.

STATEMENT OF THE CASE

The Facts

In September of 1976, Respondent John Louis Evans, III, was released on parole from an Indiana prison. (Tr. 238, 321)[3] Before being released, Evans had made plans with a fellow inmate named Wayne Eugene Ritter to go on a cross-country crime spree when they got out. (Tr. 322) After leaving Indianapolis on Christmas Day, 1976, Evans and Ritter committed armed robberies in three different cities. (Tr. 323) They then went to Mobile, Alabama to commit another robbery. (Tr. 212, 324)

On January 5, 1977, in Mobile, Evans and Ritter robbed a pawn shop where Edward A. Nassar was employed. (Tr. 211-

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[3]References to "Tr." are references to the two-volume record of Evans' state court trial. That state trial record was an exhibit to the answer in the district court, and is part of the record on appeal.

219, 324-325) During the robbery, Evans murdered Nassar by shooting him in the back while Nassar's seven- and nine-year old daughters watched. (Tr. 142, 215-219, 324-325)

In the two months after Evans murdered Nassar, Evans and Ritter committed numerous violent crimes, including more robberies, in a half dozen different states. (Tr. 326-329) They were finally apprehended in Arkansas by F.B.I. agents on March 7, 1977. (Tr. 156-166) The Nassar murder weapon was found in Evans' motel room. (Tr. 142-145, 157-162, 198-200)

On March 8, 1979, after being informed of his rights and waiving them, Evans voluntarily confessed to F.B.I. agents in Arkansas that he was guilty of the robbery and murder of Nassar, as well as of numerous other crimes. (Tr. 170-174, 275-278) After waiving extradition,

Evans was taken to Mobile where, on March 11, 1977, he voluntarily gave to the Mobile Police Department another statement confessing that he had robbed and murdered Nassar, and had committed numerous other crimes. (Tr. 288-292, 331)

The State Trial Court Proceedings

On April 4, 1977, Evans voluntarily appeared before the Mobile County Grand Jury, against the advice of his attorney, and freely testified at length about robbing and murdering Nassar. (Tr. 3, 230-233, 318-337) Evans told the grand jury that he fully understood the consequences of his action in shooting Nassar, that Nassar was not the first man he had killed, and that he would not hesitate to kill again. (Tr. 325, 333-336) Evans also told the grand jury that he wanted to be indicted as soon as possible, that he intended to plead guilty, and that he

preferred execution to life in prison. (Tr. 332, 337)

On April 8, 1977, the Mobile County Grand Jury indicted Evans for the crime of robbery during the course of which the victim is murdered (Tr. 1), which is a capital offense under Code of Alabama 1975, § 13-11-2(a)(2).

At arraignment on April 18, 1977, against the advice of his attorneys, Evans pleaded guilty. (Tr. 67-68, 71) The trial court entered the guilty plea in the official minutes of the court (Tr. 8), and notwithstanding that plea the case was submitted to a jury for the reasons discussed on pp. 53-56 of this petition, infra.

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) The State's evidence included two eyewitnesses who positively identified Evans, expert

testimony matching the death bullet to Evans' pistol, and Evans' confession to the F.B.I. (Tr. 100-101, 131-133, 142-162, 182-183, 198-200, 277-278)[4]

After the State rested, Evans filed a written "Motion to Enter Guilty Plea," which he had signed acknowledging and waiving his constitutional right not to plead guilty. (Tr. 207-209, 252, 285-286) Evans' written guilty plea was accepted by the court and admitted into evidence. (Tr. 207-209, 252, 285-286)

Thereafter, Evans took the stand and testified against himself. (Tr. 210-216) As his own direct examination, Evans told the jury:

> MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during

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[4]The State's evidence is detailed in Evans v. State, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).

> the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say. (Tr. 211)

On cross-examination, Evans testified he had shot Nassar in the back. (Tr. 215) When asked if he felt any remorse for murdering Nassar, Evans stated, "Not at all." (Tr. 216) Evans also said that his attorneys had advised him 20 to 30 times not to pursue the course of action he was pursuing at trial. (Tr. 215-216)

After Evans testified, his co-defendant Ritter took the stand and testified. (Tr. 216-221) In his testimony, Ritter confessed his part in the crime and implicated Evans. (Tr. 218-221)

The jury took less than fifteen minutes to convict Evans of the capital offense. (Tr. 226-227) Following a sentence hearing on April 27, 1977, the trial court sentenced Evans to death. (Tr. 9-12, 229-337)[5]

The State Appellate Court Proceedings

Evans' conviction and sentence were automatically appealed pursuant to Code of

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[5]Ritter was also convicted of the capital offense and sentenced to death. Ritter's conviction and sentence were affirmed in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), remanded, 375 So. 2d 266 (Ala. Cr. App. 1978), aff'd, 375 So. 2d 270 (Ala. 1979), vacated and remanded, 100 S. Ct. 3044 (1980). The Ritter case is presently before the Alabama Supreme Court on remand from this Court. See pp. 58 - 59 of this petition, infra.

Alabama 1975, § 13-11-5, and were affirmed by the Alabama Court of Criminal Appeals in Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977). The Alabama Supreme Court affirmed in Evans v. State, 361 So. 2d 666 (Ala. 1978), and this Court denied certiorari in Evans v. Alabama, 440 U.S. 930 (1979).

The Federal District Court Proceeding

On April 12, 1979, Evans filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama (R. 1-6),[6] which had jurisdiction pursuant to 28 U.S.C. §2254. The district court entered judgment on June 12, 1979, denying Evans' petition (R. 114), and issued an accompanying opinion which is reported as

[6]References to "R." are references to the record on appeal in this case.

Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), and is reproduced as Appendix I, pp. 46a - 128a, hereto.

The Federal Appellate Court Proceeding

Evans appealed to the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. §2253.

After submission of the appeal, this Court issued its opinion in Beck v. Alabama, 100 S. Ct. 2382 (June 20, 1980), holding that it was unconstitutional to execute a capital defendant whose jury had not been permitted to consider a lesser included non-capital offense verdict when the evidence at trial would have supported such a verdict. Thereafter, Petitioners filed in the Fifth Circuit a supplemental brief arguing that Evans' case was distinguishable from Beck both because there was no basis for a lesser included offense

verdict at Evans' trial, and because Evans had pleaded guilty. Evans, on the other hand, argued that guilty pleas had no effect in capital cases as a matter of Alabama law.

On July 1, 1980, Petitioner filed a motion requesting that the Fifth Circuit certify to the Alabama Supreme Court specified questions of Alabama law, the answers to which would either avoid in whole or part the federal constitutional issues or at least substantially modify those issues. (That motion is reproduced as Appendix D, pp. 23a - 29a, hereto.)

On October 15, 1980, the Fifth Circuit reversed the district court in an opinion reported as Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980). (That opinion is reproduced as Appendix C, pp. 15a - 22a, hereto.) The per curiam opinion, joined by two judges, refused to certify the state law questions to the Alabama

Supreme Court, and held that Evans' conviction and sentence must be set aside. One judge dissented because of the failure to certify the state law issues.

Petitioners filed a Petition for Rehearing with a Suggestion for Rehearing En Banc. Thereafter, by letter dated January 27, 1981, Petitioners informed the Fifth Circuit that the Alabama Supreme Court had agreed to decide the case of Evans' codefendant, Wayne Eugene Ritter, on remand to it from this Court. The letter further explained that in the Ritter case the Alabama Supreme Court would decide state law issues which would either moot or at least reshape the federal issues in this case, and the letter requested that a decision on the rehearing petition be held in abeyance until the Alabama Supreme Court released its Ritter decision. (The letter is reproduced as Appendix F, pp. 34a - 38a, hereto.)

On March 9, 1981, the Fifth Circuit panel extended its original opinion but denied the petition for rehearing in all other respects. (The opinion on rehearing is reproduced as Appendix B, pp. 3a - 14a, hereto.)

On March 12, 1981, Petitioners filed a Motion for Clarification of En Banc Status (which is reproduced as Appendix G, pp. 39a - 44a, hereto), and on March 20, 1981, the Fifth Circuit denied the motion to clarify (in an order reproduced as Appendix H, p. 45a, hereto).[7]

On March 20, 1981, the Fifth Circuit stayed its mandate pending the filing of this petition.

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[7] The Fifth Circuit's refusal to clarify the en banc status of this case is certainly curious in view of its usual practice of entering an order either granting or denying a request for en banc rehearing.

Apparently, Petitioner's en banc suggestion to the Fifth Circuit has either been "lost" by that court, or it has been denied sub silento.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Misinterprets this Court's Decision in Beck v. Alabama, 100 S. Ct. 2382 (1980), and is in Conflict with Related Decisions of this Court

The Court Below Misinterpreted and Misapplied the Beck Decision

In Beck v. Alabama, 100 S. Ct. 2382 (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the jury which returned the capital verdict had not been permitted to consider returning a lesser included non-capital offense verdict and "when the evidence at trial would have supported such a lesser verdict." Id., at 2384. It was undisputed in the Beck case that there was evidence to support a lesser offense instruction and that the jury would have received such an instruction had it not been for the unconstitutional preclusion clause in Alabama's capital

punishment statute. Id., at 2385 & n. 5. This Court carefully limited its decision to "these circumstances." Id., at 2384.

In the present case the Fifth Circuit has disregarded those careful limitations and has held that the Beck decision requires that all pre-Beck Alabama capital convictions and sentences be reversed regardless of the circumstances in a particular case. The court below has misinterpreted Beck as mandating what amounts to a conclusive presumption of harm for all pre-Beck capital cases.

The absolute nature of this new presumption of harm rule is illustrated by its application to this case in which there was not one jot, speck, or iota of evidence at Respondent Evans' trial to support any lesser included offense instruction. Evans not only admitted and confessed his guilt at every stage, including the trial, he even pleaded guilty

to the capital offense and asked to be sentenced to death. See, pp. 4 - 9, supra.

After Evans received the capital conviction and death sentence which he had so actively sought and which he so richly deserved, the court below held that that conviction and sentence must be set aside because of the unconstitutionality of the preclusion clause, a statutory provision which did not even operate in Evans' case. See, pp. 29 - 37, infra. Moreover, the court below held, Evans v. Britton, 628 F. 2d 400, 401 (5th Cir. 1980), see, p. 11a, infra, that any contrary decision "has been foreclosed by the Supreme Court."

The court below's misinterpretation of the Beck decision is based on three words — "in every case" — which appear in the Beck opinion on 100 S. Ct. at 2392. By reading those three words and the paragraph they are in out of context, the

lower court has erroneously concluded that this Court held in Beck that every defendant who had been tried under the Alabama capital punishment statute had been subjected to unconstitutionally unreliable factfinding, regardless of the particular circumstances in his case. See, Evans v. Britton, 628 F. 2d at 401 (before rehearing), and slip op. at 4396 (on rehearing); pp. 11a - 12a, 17a - 19a, and 21a, infra.

This Court neither made nor intended to make such a far-reaching holding in Beck, because in the very first paragraph of its Beck opinion, this Court limited its holding as follows:

> We granted certiorari to decide the following question:
>
> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence

> would have supported such a verdict?" ___ U.S. ___, 100 S. Ct. 204, 62 L. Ed. 2d 132.
>
> We now hold that the death penalty may not be imposed under these circumstances.

100 S. Ct. at 2384 (emphasis added). The Beck case did not present any other question, because the State conceded that the evidence in that case was such that had it not been for the preclusion clause Beck's jury would have been instructed on lesser included offenses. 100 S. Ct. at 2385 & n. 5. The present case is radically different, but the court below has held that this difference is of no legal significance, because it has misinterpreted the three words "in every case."

The words "in every case," as they appear on 100 S. Ct. at 2392, mean in every case within the scope of the grant of certiorari. They man "in every case" covered by what this Court described as

"these circumstances," 100 S. Ct. at 2384 — every case in which there was an evidentiary basis for a lesser included offense instruction which was not given. They mean in Beck's case and in all the many cases like it, but not in the unusual case like this one in which the defendant not only does not contest his guilt, but also admits, confesses, and brags about it, and even enters a guilty plea.

The full paragraph of the Beck opinion from which the lower court lifted the words "in every case" is as follows:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief

> that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

100 S. Ct. at 2392 (emphasis added; footnote omitted). The two underlined statements, referring to the "extraneous factors" cannot possibly have been intended to apply to literally "every case" tried under Alabama's statute, including the present one.

Take, for example, the first statement or "extraneous factor" referred to: "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an

impermissible reason — its belief that the defendant is guilty of some crime and should be punished." This Court cannot possibly have meant to say that in literally "every case" in which juries are not permitted to consider lesser included offense verdicts there is an intolerable level of uncertainty and a risk of unreliable factfinding.

This Court cannot have meant to say that, because the rule in every jurisdiction in this country — including the federal courts — is that lesser included offense instructions need not be given when there is absolutely no evidence to support them. See, Beck v. Alabama, 100 S. Ct. at 2387-2390 (collecting cases). No one has ever suggested that the Constitution requires that a capital jury be instructed on a lesser included non-capital offense which is not supported by the evidence, and this Court itself has held, at least implicitly,

that the Constitution does not. See, Gregg v. Georgia, 428 U.S. 153, 160-163, 215-216 (1976) (upholding Georgia's statute which provides for lesser included offense instructions only when such instructions are supported by some "view of the evidence").

This Court's statement in the Beck opinion about jury verdicts being unreliable in the absence of lesser included offense options must have been intended to mean "in every case" in which there was an evidentiary predicate for lesser offense verdict options, and only in such cases. Otherwise, that literal language would reverse Gregg v. Georgia, supra, in which the trial court refused to instruct the jury on a particular lesser included offense because there was no evidence to support it. 428 U.S. at 161 n. 2. Taking the "every case" language out of context and reading it literally, as the

lower court did, will also lead to the invalidation of every single capital punishment statute in this country, because all of the statutes provide for lesser included offense instructions when, and only when, such instructions are supported by the evidence.

A similar type of limitation must also be applied to the phrase "in every case" insofar as it refers to the second "extraneous factor" set out in the paragraph of the Beck opinion in question. That second statement referring to another "extraneous factor" that may affect the jury is that "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." 100 S. Ct. at 2392 (footnote omitted). Surely, this Court cannot have meant that there was a constitutionally intolerable risk

of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out in that same opinion that there had been a 96% conviction rate in pre-Beck capital cases. 100 S. Ct. at 2391 & n. 18. This Court cannot have meant to find that there had been an intolerable risk of improper acquittals in pre-Beck cases like the present one unless it meant to hold that a 4% acquittal rate was intolerably high.

The meaning of the words "in every case" and the passage in the Beck opinion from which the lower court lifted those words is also evident from the particular argument of the State that that passage was written to answer. The State had argued that any effect the preclusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a

serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirement. The State had argued that when there was an evidentiary basis for a lesser offense the preclusion clause's push toward improper convictions would be offset by the verdict form's push toward improper acquittals. Beck v. Alabama, 100 S. Ct. at 2390 - 2391.

This Court rejected that argument of the State, id., at 2391 - 2392, but that is not the important point here. The important point here is that the passage referring to an intolerable risk of erroneous factfinding "in every case" came directly in answer to the particular argument of the State which has been referred to. The State argued that in every case like Beck's in which there was an evidentiary basis for lesser included offense there would be an offsetting of pressures on the jury. This Court in rejecting that argument answered that in

every such case — "in every case" like Beck's — there would be uncertain and unreliable factfinding.

But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no occasion for the jury to think that the defendant was guilty of a serious lesser offense and should not be acquitted for that reason.

Nor do defendants like Evans have any basis for complaint about the jury verdict form requirement. Its only possible effect would be to encourage the jury to acquit a defendant who should be convicted. Beck v. Alabama, 100 S. Ct. at 2390, 2392. Since there was only a 4% acquittal rate, id., at 2391, there is no evidence that the jury verdict form

requirement resulted in any improper acquittals. In any event, Evans has no basis to complain about being convicted under a procedure which might have encouraged his jury to erroneously acquit him. If the procedure erred in the present case, it erred in Evans' favor, and Evans was convicted in spite of it, not because of it.

In summary, the court below misinterpreted and misapplied this Court's decision in Beck v. Alabama, 100 S. Ct. 2382 (1980). In doing so, the court below ignored this Court's own careful limitation in the grant of certiorari and holding in the Beck case, and it did so by reading three words from the opinion out of context. The net result, a rule which conclusively presumes harm in all cases regardless of the factual circumstances in each individual case, is not only unauthorized by any decision

of this Court but is totally at odds with this Court's decisions.

Respondent Evans was Not Harmed or Prejudiced in any way by the Mere Existence of the Preclusion Clause

The court below felt compelled to conclusively presume harm and prejudice, because there was absolutely no evidence on which to base such a conclusion. The record on appeal includes the entire state trial court transcript and the transcript of the habeas hearing held before the district court. Neither contains even a speck of evidence that Evans' trial would have been any different had the preclusion clause not existed. All of the evidence establishes beyond dispute that the preclusion clause had no effect on Evans or the trial.

As this Court has noted, absent the preclusion clause the rule in Alabama is that a defendant is entitled to a lesser

included offense instruction if there is any reasonable theory from the evidence which would support a verdict for the lesser instead of the higher offense. Beck v. Alabama, 100 S. Ct. at 2385 n. 5. Under Alabama law, a defendant is entitled to a lesser included offense instruction only if there is some evidentiary basis for it — some basis in the evidence from which the jury could reasonably conclude that the defendant was innocent of the higher offense but guilty of some specific lesser offense. As the Alabama Supreme Court said in severing the preclusion clause from the remainder of the capital punishment statute, "[a]bsent the fourteen words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence."

Beck v. State, ___ So. 2d ___, No. 77-530 (Ala. Dec. 19, 1980) (on remand from the United States Supreme Court), slip op. at 24.

The preclusion clause came into operation only in cases, like Beck, where there was an evidentiary basis for lesser included offense instructions which would have been given had it not been for the preclusion clause. In cases like the present one, however, the preclusion clause had no effect because there would have been no lesser included offense instruction given anyway. There was no evidentiary basis for lesser included offense instructions in this case, because Evans admitted, confessed, and pleaded guilty to the capital offense at every stage of the case up to and including

the trial itself. See pp. 4 - 9, supra.[8]

Without disputing the fact that there was no evidence to support any lesser included offense verdict, the court below said:

> It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that this death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

Evans v. Britton, 628 F. 2d 400, 401 (5th Cir. 1980); p. 20a, infra. That statement totally misapprehends the nature of the preclusion clause and the way it operated.

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[8]If there is any doubt about whether as a matter of state law the jury in this case would have been instructed on any lesser included offense absent the preclusion clause, then the court below should have certified that question to the Alabama Supreme Court. The Petitioners moved the court below to do so. See paragraph 1(c) of the Motion to Certify Questions of Alabama Law to the Alabama Supreme Court, which is reproduced on pp. 24a - 25a of the appendix. See also, pp. 48 - 58, infra.

The State never "told" Evans that there were no lesser included offenses which he could attempt to establish in order to avoid a capital conviction. The preclusion clause did not result in the jury being told to disregard the possibility that a defendant was guilty of a lesser non-capital offense but not of the capital offense itself. Instead, the preclusion clause "told" the jury to acquit if it was convinced that the defendant was guilty of anything less than the capital offense. The preclusion clause "told" Evans that if he could convince the jury he was guilty of anything less than the capital offense — and that included a lesser non-capital offense — then he was due to be released.

The preclusion clause did not preclude a defendant from presenting evidence that he was guilty of only a lesser non-capital offense, it only precluded the

defendant from being convicted and sentenced for such an offense. The defendant was still free to present lesser included offense evidence and argue that he was due to be acquitted of the capital offense because he was guilty of only a lesser offense. That is exactly what the defendant Beck did in Beck v. Alabama, 100 S. Ct. at 2385, which proves that the preclusion clause did not bar lesser offense evidence.

Nor did the preclusion clause discourage defendants from presenting lesser offense evidence. Indeed, if anything, the preclusion clause actually encouraged the presentation of lesser offense evidence that otherwise might not have been brought forward. That is true, because without the preclusion clause a defendant who proved himself guilty of a serious lesser non-capital offense would have guaranteed himself a very long term in prison.

However, so long as the preclusion clause operated, a capital defendant had everything to gain and absolutely nothing to lose by attempting to prove that he was guilty of a lesser offense instead of the capital offense. The defendant in Beck v. Alabama, supra, knew when he took the stand that if he persuaded the jury he was guilty of the lesser offenses of robbery and felony murder instead of the capital offense he would get off scott free. That is why he admitted his guilt of those lesser offenses.

Because of the preclusion clause, Beck, Evans, and all the other capital defendants had no reason not to present evidence of lesser offenses. On the other hand, if the preclusion clause had not existed, they would have had reason not to present evidence of lesser offenses — the long prison term such evidence would have guaranteed as a minimum for them.

The point is not that the preclusion clause did not operate unconstitutionally when evidence of lesser offenses was in fact presented -- that has already been decided in the Beck case. Instead, the point is that the preclusion clause did not prevent lesser included offense evidence, did not discourage the presentation of such evidence, and if anything actually operated as an incentive for the presentation of such evidence.

The present case is the prime example of how the preclusion clause actually operated as an incentive for the defendant to present lesser offense evidence to the jury. Evans told the grand jury that he intended to plead guilty and seek electrocution. (Tr. 332, 337) He explained to the grand jury that, "...I'm asking to be electrocuted in a, uh, a chair because I can't see spending the rest of my life locked up in a penitentiary,

you know, I'm too young for that." (Tr. 332) Absent the preclusion clause the thing Evans feared the most — spending the rest of his life "locked up in a penitentiary" — was the guaranteed result of convincing the jury that he was guilty of a serious lesser non-capital offense.

However, with the preclusion clause, Evans would have been due to be discharged on the entire charge if he could have convinced the jury that he was guilty of only some lesser non-capital offense. At least, he had nothing to lose by pursuing that strategy. The fact that Evans did not respond to the incentive provided by the preclusion clause by presenting a lesser defense simply shows that he was so hell-bent on self-destruction that he was not affected by the preclusion clause or by anything else.

The court below speculated that the preclusion clause was a "brooding omnipresence" which must have affected every aspect of Evans' trial. Evans v. Britton, 628 F. 2d at 401; pp. 19a - 20a, infra. As explained above, if the preclusion clause had any effect, it could only have been to encourage Evans to develop, present, and argue lesser offense evidence.

The fact that the court below's speculation is unfounded is demonstrated by the record. The record shows that neither the preclusion clause nor any other aspect of Alabama's capital punishment statute caused Evans to pursue the course of action he took at trial. Evans began his legally self-destructive course in Little Rock, Arkansas, on March 8, 1977, the day after he was arrested there. Before Evans knew anything about the particularities of Alabama's statute and long before he had even heard of the

preclusion clause, he freely and voluntarily confessed to F.B.I. agents in Little Rock his guilt of more than a dozen violent crimes including this capital offense. (Tr. 170-174, 275-278)

Evans then waived extradition, and after being transported to Alabama, he freely and voluntarily confessed again on March 11, 1977, to the Mobile Police Department. (Tr. 288-292, 331) Evans insisted on appearing before the grand jury, and he freely and voluntarily confessed still another time to that body. (Tr. 3, 318-337) He told the grand jury that he intended to plead guilty and seek electrocution. (Tr. 332, 337)

The record establishes that the State of Alabama is not being fundamentally unfair to Mr. Evans. The Mr. Evans who made that claim before the court below is the same Mr. Evans who first derived great

pleasure from committing several dozen violent crimes, including the murder of the innocent victim in this case, and then took such delight in bragging about his crimes over and over again.

What is fundamentally unfair is the rule adopted by the court below which conclusively presumes harm and prejudice from nothing more than sheer speculation. Not only is that rule fundamentally unfair, it also is contrary to the decisions of this Court.

The Rule of Presumed Harm Adopted by the Court Below is Contrary to Decisions of this Court

This Court has long held that criminal convictions are not to be set aside, either on habeas or direct appeal, based on mere speculation about harm and prejudice. The long-established rule of this Court was expressed in Beck v.

Washington, 369 U.S. 541, 558 (1962), as follows:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956). This burden has not been met.

The rule adopted by the court below did not place the burden of showing essential unfairness on Evans but instead conclusively presumes unfairness based on nothing more than that court's own speculation about what might have happened had the preclusion clause never existed.

The court below violated the rule announced in Beck v. Washington, supra, by not requiring Evans to establish harm and prejudice "as a demonstrable reality."

Indeed, under the rule announced below, a habeas petitioner need not even allege harm and prejudice. While Evans' habeas petition did aver that the preclusion clause was unconstitutional, the petition did not allege that Evans would have acted any differently had it not been for the preclusion clause. (R. 1-8, 24-35) Evans has never alleged that the preclusion clause affected his actions or his trial in anyway, and under the decision below he is not required to do so.

Instead of reversing the district court, the appellate court below at most should have remanded the case for a hearing to determine whether Evans was harmed or prejudiced in any way by the mere existence of the preclusion clause. That is exactly what the court below has done in other habeas cases. See, e.g., Lockett v. Blackburn, 571 F. 2d 309 (5th Cir.), cert. denied, 439 U.S. 873 (1978)

(remanding for a harm and prejudice hearing because, "[a] habeas petitioner must both allege and demonstrate prejudice to obtain the writ.")

The decision below is also contrary to the rule expressed in Blackledge v. Allison, 431 U.S. 63, 74 (1977), that:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible. Machibroda, supra, at 495-496, 82 S. Ct. 510, 7 L. Ed. 2d 473 (§ 2255); Price v. Johnston, supra, at 286-287, 68 S. Ct. 1049, 92 L. Ed. 1356 (§ 2243). (footnote omitted)

Evans solemnly declared in open court at arraignment (Tr. 8, 67-68, 71), and at trial (Tr. 207-216, 252, 285-286) that he was guilty of the capital offense and should be convicted. The court below has disregarded those solemn declarations and it has done so based on nothing more than

that court's own contentions — never even pleaded by Evans — which in the face of the record are wholly incredible.

If a conclusive presumption of prejudice rule is to be adopted in place of the rule announced by this Court in Beck v. Washington, supra, and if solemn declarations in open court are to be disregarded contrary to this Court's expressions in Blackledge v. Allison, supra, such a major change in the law should not be made by a lower appellate court. This Court should grant the writ to examine, consider, and either accept or reject the conclusive presumption of prejudice rule adopted by the court below.

II.

The Decision Below is Contrary to Decisions of this Court Concerning the Effect of Guilty Pleas

The court below held that Evans' guilty plea to the capital offense had no effect on the preclusion clause issue

for two reasons. First, the court below held that as a matter of Alabama law a guilty plea has no effect in a capital case. Evans v. Britton, ___ F. 2d ___ (5th Cir. 1981) (on rehearing), slip op. at 4393-4395; pp. 4a - 8a, 13a - 14a, infra. As explained on pp. 53 - 56, infra, that holding misinterprets Alabama law and underscores the court below's error in failing to certify that question of Alabama law to the Alabama Supreme Court.

Secondly, the court below held that, as a matter of federal constitutional law, a guilty plea has no effect at all other than to waive constitutional challenges to proceedings which occurred before the plea was entered. Evans v. Britton, supra, slip op. at 4395-4396; pp. 8a - 11a, infra. While cases like Tollett v. Henderson, 411 U.S. 258, 267 (1973), relied on by the court below, do establish that one effect of a guilty plea is to waive constitutional

defects occurring prior to the plea, this Court has never limited the effect of guilty pleas to merely that.

McCarthy v. United States, 394 U.S. 459, 466 (1969), said that, "A guilty plea is an admission of all the elements of a formal criminal charge." This Court in Menna v. New York, 423 U.S. 61 (1975), reviewed its decisions in Tollett v. Henderson, 411 U.S. 258 (1973), Brady v. United States, 397 U.S. 742 (1970), and McMann v. Richardson, 397 U.S. 759 (1970). In doing so, this Court explained that:

> In Tollett we emphasize that waiver was not the basic ingredient of this line of cases, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional

> violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. ...

Menna v. New York, 423 U.S. at 62-63, n. 2 (emphasis in original).

In this Court's words, Evans' guilty plea "quite validly" removes the issue of factual guilt from this case. Since the sole danger of the preclusion clause was that it increased the risk of an erroneous factual determination of guilt, Beck v. Alabama, 100 S. Ct. at 2387-2390, the mere existence of the clause is rendered irrelevant by Evans' guilty plea which removed the issue of factual guilt from the case.

The holding of the court below that guilty pleas have only a limited waiver effect and do not remove the issue of factual guilt from a case is contrary to this Court's prior decisions which were explained in Menna v. New York, supra. This Court should grant certiorari to

clarify the matter and to correct the court below.

III.

The Court Below Adopted a New Rule for Certification of State Law Questions that is Contrary to this Court's Decisions and Policies

The Rule Established by Decisions of this Court

In Bellotti v. Baird, 428 U.S. 132, 147 (1976), this Court established the rule that a federal court should certify state law questions to the appropriate state supreme court whenever answers to such questions "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." See, e.g., Boehning v. Indiana Employees Asso., 423 U.S. 6, 7-8 (1975) (abstention required where state law answers might moot federal issue); Dillard v. Virginia Industrial Commission, 416 U.S. 783, 797-798

(1974) (the court should abstain where state law question could be dispositive); Lake Carriers' Asso. v. MacMullen, 406 U.S. 498, 510-511 (1972) (a "paradigm case" for abstention is where an answer to a state law issue might "avoid or modify" the federal issue); Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970) (abstention ordered where "it is conceivable" that answers to state law issues might narrow the federal question.)

The Rule Adopted by the Court Below

After this Court's decision in Beck v. Alabama, 100 S. Ct. 2382 (1980), and before the court below issued any decision in this case, Petitioners filed a motion requesting the court below to certify to the Alabama Supreme Court seven specified questions of Alabama law which were raised in the wake of the Beck decision. The Motion to Certify is reproduced as Appendix D, pp. 23a - 29a, infra.

The motion stated that there were no clear, controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions, that resolution of the questions would avoid in whole or in part the federal constitutional issues in this case, or at least substantially modify them; and, that answers to the state law question should come from the Alabama Supreme Court because those answers would vitally affect the public policy of Alabama. The motion also stated that Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. See pp. 26a - 28a.[9]

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[9]The Alabama Constitution of 1901, Article VI, 140(b)(3), as amended by Amendment No. 328, authorizes the Alabama Supreme Court to answer state law questions certified to it by federal courts. Alabama Rule of Appellate Procedure 18, reproduced as Appendix E, pp. 30a - 33a, infra, provides the procedure for answering such questions.

No one has ever doubted the adequacy of Alabama's certification procedure. Indeed, the
[footnote continued on next page]

Without taking issue with any of the grounds of the Motion to Certify, the court below, with one judge dissenting, refused to certify any of the state law questions to the Alabama Supreme Court.[10]

[footnote continued from preceding page]

court below has been so impressed with Alabama's certification procedure that it has twice felt compelled to praise the procedure. See, Tyler v. Insurance Co. of North America, 520 F. 2d 341 (5th Cir. 1975) ("the valuable tool provided by the certification provision of the Alabama Constitution"); Barnes v. Atlantic & Pacific Life Ins. Co., 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama now has are invaluable tools of cooperative judicial federalism.").

[10]For unknown reasons, the court below discussed the certification issue only in terms of the severability question. Evans v. Britton, 628 F. 2d at 401-403; pp. 17a - 22a, infra. There is no longer any need to certify the severability issue, since the Alabama Supreme Court has answered it in Beck v. State, No. 77-530 (Ala. Dec. 19, 1980) (on remand), slip op. at 24-27, by holding that the preclusion clause is severable from the remainder of the statute.

However, some of the remaining state law questions specified in the Motion to Certify have not been answered and could still avoid in whole or in part, or at least redefine, the federal issues. See pp. 52 n. 11, and 53-56, infra.

The majority reasoned that since it had concluded that Evans was entitled to a new trial as a federal constitutional matter, "certification would be nothing more than an empty academic exercise." Evans v. Britton, 628 F. 2d at 401; p. 21a, infra.

Under the rule adopted by the court below, state law questions are not to be certified if answers to the federal constitutional issues will make the state questions moot. This rule stands the law of abstention-certification on its head. The purpose of abstention-certification is not to avoid or define state law questions by answering federal constitutional issues, but just the opposite. The court below has the rule backwards — the idea is to make federal issues "an empty academic exercise," not the state law questions.[11]

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[11] The fifth state law question Petitioners moved the court below to certify — whether after Beck v. Alabama, supra, Evans was entitled as a matter of state law to have his conviction and sentence reversed — illustrates how all the federal constitutional issues might have been mooted by answers to the state law questions. See p. 25a, infra.

The State Law Question Concerning the Guilty Plea

What the rule adopted below can lead to is illustrated by the way the court below handled the state law question concerning the status and effect of Evans' guilty plea under Alabama law.

Evans pleaded guilty at arraignment (Tr. 67-68, 71) and at trial. (Tr. 207-209, 252, 285-286) In Alabama, when a defendant in a capital case pleads guilty, the case against him is still submitted to a jury, since only a jury can sentence a defendant to death under Alabama law. Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979).

The fact that guilty plea capital cases are submitted to juries does not mean that a guilty plea has no effect under Alabama law. The Alabama Court of Criminal Appeals has held that notwithstanding the necessity of presenting every capital case to a jury, a guilty plea in

a capital case still has the effect of waiving all non-jurisdictional defects in the case. Graham v. State, ___ So. 2d ___, No. 4 Div. 787 (Ala. Cr. App. 1980), slip op. at 16, cert. granted, No. 79-568 (Ala. Jan. 6, 1981).

The Alabama Supreme Court held in the appeal of Evans' co-defendant, in which the facts were identical to the ones in the present case, that a guilty plea in a capital case eliminates any possibility of reversible error stemming from an omission in the trial court's oral charge. Ritter v. State, 375 So. 2d 270, 276 (Ala. 1979), vacated and remanded, 100 S. Ct. 3044 (1980). The court below misread the Alabama Supreme Court's Ritter opinion, which does say that the trial court "did not accept the guilty plea but instead set the matter for presentation to a jury." Evans v. Britton, supra, slip op. at 4394; p. 5a, infra. The court below ignored the

Alabama Supreme Court's explanation that the trial court ordered the matter presented to a jury solely because "only a jury may sentence a defendant to death under our capital felony statute." Ritter v. State, 375 So. 2d at 273. The court below also ignored the Alabama Supreme Court's holding that notwithstanding the fact that the trial court did not "accept" the guilty plea in lieu of a trial, the guilty plea nonetheless, as a matter of state law, waived any defect in the jury instructions. Id. at 275-276.

The crucial point, which the court below missed, is that even though guilty pleas are not "accepted" as the final step in an Alabama capital case, as a matter of Alabama law guilty pleas do preclude review of certain alleged defects, including any omission from the trial court's oral charge. This point of Alabama law is controlling in this case because Evans is

complaining about the omission from the trial court's charge to the jury of any lesser included offense instruction.

The harm which the court below has done by running rough-shod over a controlling issue of state law is not confined to this particular case. Thirteen of the first sixty-five capital convictions under Alabama's statute were based on plea-bargained guilty pleas. (First Stipulation, R. 67) Those thirteen guilty plea convictions are valid in Alabama courts, but they will apparently be held invalid in the federal court below based on that court's misinterpretation of Alabama law. At the very least, confusion will reign supreme and much federal-state judicial friction will be needlessly generated.

The Important Policies at Stake

In reversing the standard set out by this Court in Bellotti v. Baird, 428 U.S. 132 (1976), the court below has adopted a rule which threatens the utility of abstention-certification and endangers the important policies behind it. This Court has said that abstention-certification "minimize[s] federal-state friction" and "avoids premature and perhaps unnecessary [federa] adjudication," Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973), and "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974). As a different panel of the court below commented in Barnes v. Atlantic & Pacific Life Ins. Co., 530 F. 2d 98, 99 (5th Cir. 1976), "certification procedures such as Alabama has now are invaluable tools of cooperative judicial federalism."

The court below has taken the cooperation out of "cooperative judicial federalism." By ruling that federal courts should push aside important and possibly dispositive state law issues and grab any opportunity to exercise federal judicial powers, the court below has made the exercise of federal judicial power an end in itself. It has guaranteed years of needless federal-state judicial friction.

This court should grant certiorari to preserve, clarify, and strengthen the certification standard announced in Bellotti v. Baird, supra, and in order to reject the new rule adopted by the court below.

A DECISION ON THIS PETITION SHOULD BE HELD IN ABEYANCE UNTIL THE ALABAMA SUPREME COURT DECIDES A RELATED CASE

The case of Evans' co-defendant, Wayne Eugene Ritter, was argued and submitted to the Alabama Supreme Court on

March 16, 1981, after that case was remanded by this Court for further consideration in light of the Beck decision. See, Ritter v. Alabama, 100 S. Ct. 3044 (1980). The federal constitutional issues and the underlying state law questions in the Ritter appeal are identical to those in the present case, and the parties are represented by the same attorneys.[12]

For three reasons, this Honorable Court should hold any decision on this petition in abeyance until the Alabama Supreme Court issues its decision in the Ritter case. First, in deciding the Ritter case, the Alabama Supreme Court will necessarily address the state law questions which the federal court below refused to certify to it in this case. The answers the Alabama Supreme Court gives to those state law questions will either

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[12] See the January 27, 1981 letter Petitioners filed in the court below, which is reproduced as Appendix F, pp. 34a - 38a, infra.

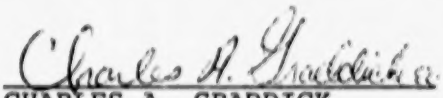
show that the federal court's refusal to certify was harmless error, or those answers will underscore the harm and confusion caused by the failure to certify. Secondly, if the Alabama Supreme Court holds that in view of the Beck decision Evans is entitled to a new trial as a matter of state law, that holding will moot not only this petition but this entire federal habeas proceeding.

Finally, if the Alabama Supreme Court rules in favor of the State and decides the federal constitutional issues differently than the federal court below, there will be a direct conflict between a federal court of appeals and a state court of last resort on an important federal constitutional issue, which will establish an additional ground for certiorari. See Rule 17.1(a).

For all these reasons, Petitioners respectfully request this Honorable Court to hold in abeyance a decision on this

petition until the Alabama Supreme Court has issued a decision in the Ritter case.[13]

Respectfully submitted,



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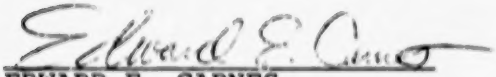

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[13]Petitioners have filed in the Alabama Supreme Court a Motion to Expedite Decision in the Ritter case.

Petitioners will inform this Court as soon as the Alabama Supreme Court issues its Ritter decision.

CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 10th day of April, 1981, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to each of the following counsel of record for Respondent:

Honorable John R. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, Alabama 36104

Honorable Steven A. Feiss
2555 N Street N.W.
Washington, D.C. 20037

I further certify that I have served all parties required to be served.

Edward E. Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1714

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT G. BRITTON, Commissioner,
Alabama Department of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Petitioners

v.

JOHN LOUIS EVANS, III,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF CERTIORARI

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SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF CERTIORARI

On May 9, 1981, the Alabama Supreme Court issued its opinion in Ritter v. State, ___ So. 2d ___ No. 79-798 (Ala. 1981), on remand from this Court. The Ritter case is discussed on pp. 58-61 of

our Petition for a Writ of Certiorari, and on pp. 1-2 of Respondent's Memorandum Opposing Certiorari. (A copy of the Alabama Supreme Court's May 9, 1981 opinion in Ritter is attached as Appendix A to that memorandum.)

Petitioners filed a petition for a rehearing in Ritter requesting the Alabama Supreme Court to clarify whether its decision in that case was based on federal or state law grounds. On June 12, 1981, the Alabama Supreme Court extended its original opinion in Ritter to clarify the grounds of that decision. (A copy of that June 12, 1980 extension has already been submitted to this Court by Respondents.)

The Alabama Supreme Court's June 12, 1981 extension of opinion in Ritter makes it clear that that decision was based solely on federal constitutional grounds and is therefore no impediment to certiorari in this case. Explaining its

decision in Ritter, the five-member majority states that:

> We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, ___ F. 2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

Ritter v. State, supra, slip op. at 2 (majority opinion).

Likewise, the special concurring opinion of Justice Maddox, joined by two other justices, states that:

> I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in Beck v. Alabama, ___ U.S. ___ (1980). ...

Ritter v. State, supra, slip op. at 10 (special concurring opinion of Maddox, J.).

The issue remains a federal constitutional one. The fact that the Alabama Supreme Court has joined the Fifth Circuit in misinterpreting this Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), in no way lessens the need for this Court to review the matter. Indeed, the Alabama Supreme Court's Ritter decision makes certiorari in this case even more imperative, because this Court is now the only one which can correct the rampant misinterpretation of its Beck decision.

The federal constitutional issues are clearly drawn by the facts in the case of this respondent and his codefendant Ritter. The factual clarity is emphasized by the following portion of a separate opinion joined by the three members of the Alabama Supreme Court in Ritter:

> Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v.

State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1978), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the

> indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

Ritter v. State, supra, slip op. at 7-8 (opinion of Jones, J., concurred in by Maddox and Adams, J.J.) (on rehearing).

The federal constitutional issues are clearly drawn, they are important, and it is now clear that there are no state law questions involved. This Court should grant certiorari.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

/s/ Edward E. Carnes
EDWARD E. CARNES
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 15th day of June, 1981, I did serve a copy of this Supplemental Memorandum in Support of Certiorari on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to each of the following counsel of record for Respondent:

Honorable John L. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, Alabama 36104

Honorable Steven A. Reiss
2555 N. Street N.W.
Washington, D.C. 20037

I further certify that I have served all parties required to be served.

/s/ Edward E. Carnes
EDWARD E. CARNES
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

80-1714

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT G. BRITTON, Commissioner,
Alabama Department of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Petitioners

v.

JOHN LOUIS EVANS, III,

Respondent

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

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250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
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ATTORNEYS FOR PETITIONERS

TABLE OF APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 79-2674

D. C. Docket No. CA-79-0200-H

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Respondent-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before VANCE and SAM D. JOHNSON, Circuit Judge, and THOMAS*, District Judge.

J U D G M E N T

This cause came on to be heard on the

transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed:

It is further ordered that respondents-appellees pay the costs on appeal to be taxed by the Clerk of this Court.

October 15, 1980

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

Issued as Mandate:

[a copy of the Court's opinion, reproduced herein as Appendix____and Appendix_____, was attached]

---

*United States District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX B

John Louis EVANS, III,

Petitioner-Appellant,

v.

Robert G. BRITTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison,

Respondents-Appellees.

No. 79-2674.

United States Court of Appeals, Fifth Circuit.

March 9, 1981.

On Petition for Rehearing

[Opinion Oct. 15, 1980, 628 F. 2d 400 (5th Cir. 1980)]

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

*District Judge of the Southern District of Alabama, sitting by designation.

PER CURIAM:

In its petition for rehearing, the state raises two points which merit further comment.

The state first argues that the panel ignored the effect of Evans' guilty plea. The state maintains that, under Alabama law, the guilty plea was effective, and forecloses on any doubt regarding the fairness of Evans' trial. The initial difficulty with the state's position is that Evans' guilty plea was not accepted by the trial court. The Alabama Supreme Court reached this specific point in dealing with Evans' codefendant Ritter. Evans and Ritter both entered identical pleas, Evans v. State, 361 So. 2d 654, 655-56 (Ala. Crim. App. 1977). On appeal, the Alabama Supreme Court adopted the statement of facts of the Court of Criminal Appeals, affirmed as to Evans, but remanded to the Court of Criminal Appeals as to Ritter, Evans v. State, 361 So. 2d

666 (Ala. 1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979). On remand the Court of Criminal Appeals reinstated the conviction, Ritter v. State, 375 So. 2d 266 (Ala. Crim. App. 1978). In affirming, the Supreme Court described the events as follows:

> Nevertheless, against the advice of his attorney, Ritter entered a guilty plea to the robbery and intentional killing of Nassar. (He also pled guilty to the robbery of a Radio Shack in Mobile.) The trial judge, however, did not accept the guilty plea but instead set the matter for presentation to a jury.

Ex parte Ritter, 375 So. 2d 270, 276 (Ala. 1979), vacated, ___ U.S. ___, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980) (emphasis added). Since Ritter's plea was identical to Evans', it is clear that, under Alabama law as interpreted by the Alabama

Supreme Court, Evan's plea of guilty was not accepted.[1]

The instruction which the trial judge gave to the jury makes it clear that the rejected guilty plea was not determinative.

> I can only tell you that in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further. You must reach a verdict that is supported by all of the creditable evidence that has been presented to you in this case.... A Defendant in Alabama is presumed to be innocent, and this presumption of innocence attends

[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 13a - 14a, infra.

> him as a matter of evidence until the State has, by the evidence, proved him guilty beyond all reasonable doubt. That is the burden that is on the State of Alabama. They must prove the Defendant guilty beyond all reasonable doubt.... Until and unless the State proves the Defendant guilty beyond a reasonable doubt, you cannot convict him.

The state took no exception to these instructions at trial. It therefore cannot now be heard to argue that "a valid guilty plea conclusively establishes all elements of the offense charged and removes any issue of factual guilt."[2] We also observe that the Alabama courts themselves considered the merits of Evans' contention that the death penalty statute was unconstitutional. Contrary to the state's position, the Alabama courts were

no more willing than we to regard the rejected guilty plea as disposing of the constitutional issue. Evans v. State, 361 So. 2d at 662; Evans v. State, 361 So. 2d at 667.

Finally, even if all of the state's contentions were allowed, it would not have the legal result for which it argues. A guilty plea waives constitutional challenges to proceedings before the plea is entered, not to events afterwards. "The Brady trilogy announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings." Lefkowitz v. Newsome, 420 U.S. 283, 288, 95 S. Ct. 886, 889, 43 L. Ed. 2d 196 (1975).

> We thus reaffirm the principle recognized in the Brady trilogy: a guilty plea represents a break in the chain of events which has

> preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973).

The rule in this circuit is the same, as is that of Alabama.

> This Court has consistently held that a guilty plea voluntarily and understandingly made waives all non-jurisdictional defects in the prior proceedings against the accused.

United States v. Boniface, 631 F. 2d 1228, 1229 (5th Cir. 1980); accord Stanley v. Wainwright, 604 F. 2d 379, 380 n. 1 (5th Cir. 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 3019, 65 L. Ed. 2d 1118 (1980).

> A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a person admits in Open Court that he is in fact guilty of the crime or crimes with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Harris v. State, 367 So. 2d 524, 533 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 534 (Ala. 1979).

Thus, even if Evans' guilty plea had been accepted, it would have waived his right to challenge only defects in prior

proceedings. It would also have waived his right to trial. However, a guilty plea has never been held to waive future defects if the case is nevertheless tried.

The state's second point is that, in view of what it contends is the overwhelming evidence of Evans' guilt, no defects in the statute or the trial procedure, no matter how grave, could possibly have prejudiced him. However persuasive this argument might otherwise be, it has been foreclosed by the Supreme Court. In analyzing the Alabama statute in question, the Court stated as follows:

> But in every case they [the defects in the statute] introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

Beck v. Alabama, ___ U.S. ___, ___, 100 S. Ct. 2382, 2392, 65 L. Ed. 2d 392 (1980). "Every case" means even cases in which the

defendant tried to plead guilty. The Court has established that there are "constitutional error[s] of the first magnitude and no amount of showing of want of prejudice would cure [them]." Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974). Unless the Supreme Court changes its language in Beck, we must conclude that the defects in the Alabama death statute fall into this category.

We extend our opinion. In all other respects the petition for rehearing is denied.

District Judge THOMAS continues to dissent for the reasons previously stated in the panel opinion.

[Footnotes begin on next page.]

[1]Evans' and Ritter's pleas were not accepted because of language in the Alabama Death Penalty and Life Imprisonment Without Parole Act, Ala. Code tit. 13, §§ 11-1 et seq. Section 13-11-2(a) allows a death penalty to be imposed "[i]f a jury finds the defendant guilty...." This language was interpreted in Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979), to require a jury trial even if the defendant sought to plead guilty. Note the specific reference to the Evans and Ritter trial:

> The Act, ex vi termini, and the Alabama Legislature, ex proprio vigore, have set forth not only the only crimes for which one may be punished by death or by life imprisonment without parole, but also the only method by which either punishment may be lawfully imposed. Neither the death sentence nor a sentence to life imprisonment without parole is permissible, whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death.
>
> We must come to the conclusion that in Alabama the constitutional and statutory law does not permit the trial court, without a jury, to try or fix the punishment in a capital case.... In Alabama, under the Death Penalty and Life Imprisonment Without Parole Act, he cannot waive a jury trial, even with the consent of the prosecution and the consent of the trial court; he cannot by such a maneuver avoid the legal necessity for a jury to try the facts, find defendant guilty or not

> guilty, and if found guilty to fix his punishment at death. Such was the procedure in the Evans and Ritter v. State, supra, in which defendants pleaded guilty and requested the death penalty.

Id. at 746 (emphasis in original).

[2]Under Alabama law, it would not be possible to accept a guilty plea and then hold a full trial. "The rule of law is that a plea of guilty when accepted and entered by the court is a conviction...." Ex parte Sankey, 364 So. 2d 362, 363 (Ala. 1978), cert. denied, 440 U.S. 964, 99 S. Ct. 1513, 59 L. Ed. 2d 779 (1979) (emphasis added). Indeed, it is doubtful as a constitutional matter whether a guilty plea could ever be held to establish actual guilt, but still to require a full trial. In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) a defendant whose guilty plea had been accepted sought to argue the converse position, that his plea had waived trial but had not admitted factual guilt. The Supreme Court rejected this attempt to split the dual function of the guilty plea.

APPENDIX C

John Louis EVANS, III,
Petitioner-Appellant,

v.

Robert G. BRITTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison, Respondents-Appellees.

No. 79-2674.

United States Court of Appeals,
Fifth Circuit.

Oct. 15, 1980

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

PER CURIAM:

John Louis Evans, III, was convicted of capital murder by a jury and was sentenced to death in an Alabama state court. In his 28 U.S.C. § 2254 petition

*United States District Judge for the Southern District of Alabama, sitting by designation.

for habeas corpus relief, denied by the district court, 472 F. Supp. 707, he alleges that because the Alabama death penalty statute, Code of Ala. § 13-11-2 (1975), deprived him of due process of law and equal protection and constituted cruel and unusual punishment in violation of the United States Constitution, his conviction must be reversed. The Alabama statute precludes the jury from considering lesser included offenses in capital cases; thus it gives the jury the option of convicting a defendant of the capital offense or of acquitting him.

In Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), the United States Supreme Court was presented with a challenge to the Alabama death penalty statute and held that a death sentence could not constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider

a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. The state argues that Beck does not control this case. In Beck, the state conceded that Beck's testimony would have entitled him to an instruction on a lesser included offense, absent the statutory prohibition. The state says that there was no evidence adduced by Evans which would require instruction on a lesser offense even if such instruction were not prohibited. It urges that we certify to the Alabama Supreme Court whether the constitutionally offensive portions of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute. It reasons that Evans' conviction should be allowed to stand with the preclusion clause severed from the Statute.

We cannot reconcile this position with the Supreme Court's language in Beck:

In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does

not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

___ U.S. at ___, 100 S. Ct. at 2392 (emphasis added).

Obviously we cannot conclude that Evans' trial under an unconstitutional statute was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967). The peculiar nature of the offensive statute would infect virtually every aspect of any capital defendant's trial from beginning to end. Each and every decision concerning trial strategy, the selection of evidence to use and its

presentation, the argument of counsel, objections, requests for charges, all were inevitably influenced by the brooding omnipresence of the unconstitutional edict—Evans must either be sentenced by the jury tc die or he must be set free.

The state says that harm to Evans is sheer speculation because he did not even undertake to prove a lesser offense. It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

We will not speculate as to whether if tried under a constitutional statute Evans will adopt some different strategy or whether he can present evidence of some less serious offense. We also will not speculate as to whether the Supreme Court

of Alabama can judicially tailor the state statute to pass constitutional muster. We decline to certify his case to the state court because, as to Evans, certification would be nothing more than an empty academic exercise. The infirmity in his trial cannot be excised retroactively. Evans may not be executed until and unless he be tried, convicted and sentenced in a manner that at least meets minimum constitutional standards. His trial, conviction and sentence now before us was under a statute which the Supreme Court says introduces in every case a level of uncertainty and unreliability that cannot be tolerated.

The judgment of the district court denying relief under 28 U.S.C. § 2254 must be reversed.

REVERSED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. I would certify to the Alabama Supreme Court the question of whether the preclusion clause of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute.

The State of Alabama has filed a motion requesting that the certification be granted. I think that the question of severability is a question of Alabama law and that certification to the Alabama Supreme Court should be granted.

I dissent.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN LOUIS EVANS, III,	X	
	X	
Appellant	X	
	X	
v.	X	No. 79-2674
	X	
ROBERT G. BRITTON, et al.,	X	
	X	
	X	
Appellees	X	

APPELLEES' MOTION TO CERTIFY QUESTIONS OF ALABAMA LAW TO THE ALABAMA SUPREME COURT

Appellees in the above-styled cause move this Honorable Court to certify to the Alabama Supreme Court state law questions which will avoid in whole or part the federal constitutional issues involved in this appeal or at least substantially modify the nature of the federal constitutional issues. Further specification and grounds for this motion are as follows:

1. The Alabama law questions which

should be certified to the Alabama Supreme Court are these questions (hereafter referred to as "the specified state law questions"), or these questions in substance:

a. Is the preclusion clause which was ruled unconstitutional by the United States Supreme Court in Beck v. Alabama, No. 78-6621 (U.S. June 20, 1980), severable from the remainder of the Alabama Capital Punishment Statute?

b. In view of the decision in Beck v. Alabama, supra, is any other part of the Alabama Capital Punishment Statute due to be struck and severed from the remainder of the statute?

c. In view of the evidence at his trial would Appellant Evans have been entitled, as a matter of state law, to have the jury instructed on any lesser included non-capital offense had it not been for the existence of the preclusion

clause which was struck down in Beck v. Alabama, supra?

d. When he was arrested, before the grand jury, and at his trial, Evans repeatedly confessed his guilt of the capital offense for which he was convicted. He entered a guilty plea at arraignment and signed a written "Motion to Enter Guilty Plea" at his trial. At all stages of the prosecution, Evans asked that he be convicted and sentenced to death. What effect does that course of conduct have as a matter of state law — what rights and claims of error, if any, did Evans waive under state law?

e. In view of Beck v. Alabama, supra, is Evans now entitled, as a matter of state law, to have his conviction or sentence reversed?

f. Under the Alabama Capital Punishment Statute, what is the burden of proof to be applied by the trial court

judge to disputed factual issues, if any, at the sentence hearing?

g. Evans was convicted of the Code of Alabama 1975, § 13-11-2(a)(2) offense of robbery-intentional killing, and one of the aggravating circumstances that the trial court judge found and considered at the sentence hearing was the § 13-11-6(4) circumstance that the capital felony involved robbery. Was this finding a correct interpretation and application of the statute?

2. There are no clear controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions.

3. The resolution of the specified state law questions by the Alabama Supreme Court will avoid in whole or in part the federal constitutional issues involved in this appeal or will at least substantially modify the nature of the federal constitutional issues.

4. Until the specified state law questions are authoritatively determined by the Alabama Supreme Court, it is impossible to define precisely the federal constitutional issues presented in this appeal.

5. The proper, authoritative, and correct resolution of the specified state law questions vitally affects public policy of the State of Alabama and is a matter of great importance to numerous defendants and to all of the people of Alabama.

6. It is essential that the state and federal courts speak with one voice as to the specified state law questions, and the authoritative and final voice on Alabama law is the Alabama Supreme Court.

7. Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal

courts. Alabama Constitution, Article VI §140(b)(3), as amended by Amendment No. 328; Alabama Rule of Appellate Procedure 18.

WHEREFORE, Appellees respectfully request this Court to certify the specified state law questions to the Alabama Supreme Court, or in the alternative, to order the parties to submit to this Court a proposed agreed statement of facts and certificate of state law questions to be transmitted to the Alabama Supreme Court.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General
By-

/s/ Ed Carnes
Assistant Alabama Attorney General

COUNSEL FOR APPELLEES

CERTIFICATE OF SERVICE

I certify that I have served a copy of this motion on Appellant Evans by mailing copies to his attorneys at the following addresses:

Honorable John L. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, AL 36104

Honorable Steven Reiss
255 M Street, N.W.
Washington, D.C. 20037

Done this the 30th day of June, 1980.

/s/ Ed Carnes
Assistant Alabama Attorney General

ADDRESS:

Assistant Attorney General Ed Carnes
Alabama Attorney General's Office
250 Administrative Bldg.
64 No. Union Street
Montgomery, AL 36130

(205) 834-5150

APPENDIX E

ALABAMA RULE OF APPELLATE PROCEDURE 18 CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) WHEN CERTIFIED. When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the Supreme Court of this State, by written opinion, may answer.

(b) JURISDICTION. Questions or propositions of law referred to in subdivision (a) hereof shall be certified for answer to the Supreme Court.

(c) METHOD OF INVOKING RULE. The provisions of this rule may be invoked by any of the federal courts upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

(d) CONTENTS OF CERTIFICATE. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

(e) PREPARATION OF CERTIFICATE. The certificate shall be certified to the Supreme Court by the clerk of such federal court and under its official seal. The Supreme Court may, in its discretion,

require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said certified question.

(f) COSTS. The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the Supreme Court.

(g) BRIEFS AND ARGUMENT. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 28 days (4 weeks) after the filing of said certificate in the Supreme Court. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 21 days (3 weeks) after the receipt of the appellant's or moving party's brief and a reply brief may be filed within 7 days (1 week) thereafter.

(h) ORAL ARGUMENT. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

APPENDIX F

January 27, 1981

Honorable Gilbert F. Ganucheau
Clerk's Office
United States Court of Appeals
For the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: Evans v. Britton
(No. 79-2674)

Dear Mr. Ganucheau:

On November 19, 1980, I filed Appellees' Petition for Rehearing with a Suggestion for Rehearing En Banc in the above-styled case. Since that date, there have been two developments which should be brought to the Court's attention, because they directly affect this case and the issues raised in the pending rehearing petition.

The first development occurred on December 19, 1980, when the Alabama Supreme Court rendered its decision in Gilbert Franklin Beck v. State, No. 77-530 (Ala. 1980) (on remand from the United States

Supreme Court). A copy of the Alabama Supreme Court's opinion is enclosed. That decision and the opinion which accompanied it authoritatively answer the first of the four state law questions listed on pp. 2-3 of our rehearing petition. See, Gilbert Franklin Beck v. State, supra, slip. op. at 24-27. The Alabama Supreme Court has not yet answered the other three state law questions which are listed on p. 3 of our petition, but it soon will.

On January 9, 1981, the Alabama Supreme Court set a briefing and argument schedule in the case of Wayne Eugene Ritter v. State, No. 77-798 (Ala.). Oral argument is March 16, 1981, and a decision should follow soon thereafter. Ritter is the co-defendant of Evans, the appellant now before this Court in the above-styled case, and Ritter's appeal is now pending in the Alabama Supreme Court on remand

from the United States Supreme Court for further consideration in light of Beck v. Alabama, 100 S. Ct. 2382 (1980). See, Ritter v. Alabama, 100 S. Ct. 3044 (1980).

The significance of the Alabama Supreme Court's January 9, 1981, order in the Ritter case is this: it means that the Alabama Supreme Court is in the process of addressing and will soon decide those three remaining state law issues which are set out on p. 3 of our rehearing petition in the present case. The facts involving co-defendants Evans and Ritter are the same, see, Evans and Ritter v. State, 361 So. 2d 666 (Ala. Cr. App. 1978); the issues raised are identical; and, Evans and Ritter are even represented by the same lead counsel (as is true of the State of Alabama in the two cases).

The answers which the Alabama Supreme Court gives in Ritter to those three sharply disputed state law questions will

either moot our pending petition for rehearing in the present case, or those answers will underscore the panel's error in reversing the district court in the present case. If the Alabama Supreme Court holds that Ritter is entitled to a new trial as a matter of state law, then appellees will concede that Evans is entitled to the same, and that concession will moot our rehearing petition and will dispose of the present case. If, on the other hand, the Alabama Supreme Court holds that Ritter is not entitled to a new trial because his guilty plea was valid as a matter of state law and had the effect of waiving all non-jurisdictional defects, then that holding will demonstrate the panel's error in totally ignoring Evans' identical guilty plea. See pp. 5-8 of our rehearing petition. It will demonstrate that, at the very least, the panel should have addressed the guilty plea issue.

For these reasons, appellees respectfully suggest that a ruling on Appellees' Petition for Rehearing with a Suggestion for Rehearing En Banc should be held in abeyance until the Alabama Supreme Court issues its decision in Wayne Eugene Ritter v. State, supra.

Thirty copies of this letter and its enclosure are enclosed for distribution to the Court.

Sincerely,

/s/ Ed Carnes

ED CARNES
Assistant Attorney
General

EC:bb

Enclosure

cc: Honorable John L. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, Alabama 36104

Honorable Steven A. Reiss
2555 M Street, N.W.
Washington, D.C. 20037

APPENDIX G

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN LOUIS EVANS, III,	X	
	X	
Petitioner-Appellant	X	
	X	
vs.	X	NO. 79-2674
	X	
ROBERT G. BRITTON, et al.,	X	
	X	
Respondents-Appellees	X	

MOTION FOR CLARIFICATION
OF EN BANC PETITION STATUS

Respondents-Appellees [hereinafter referred to as "the State of Alabama"] move for an order clarifying the status of their previously filed Suggestion for a Rehearing En Banc. As the basis for this motion, the following is shown:

1. A panel opinion adverse to the State of Alabama was entered on October 15, 1980.

2. On November 19, 1980 (following a timely extension to that date), the State

of Alabama filed a Petition for Rehearing with a Suggestion for Rehearing En Banc.

3. The suggestion for Rehearing En Banc was filed jointly with the Petition for Rehearing, because prior to filing it the undersigned attorney for the State of Alabama was informed by one of this Court's deputy clerks that such a practice was not only permissible but was actually preferred. (It was only afterwards that Local Rule 16.3 was amended to prohibit incorporating the suggestion for rehearing en banc into the petition for rehearing before the panel.)

4. In a letter dated January 27, 1981, the State of Alabama requested that this Court hold in abeyance a ruling on its previously filed Petition for Rehearing with a Suggestion for Rehearing En Banc until the Alabama Supreme Court decides the case of Ritter v. State, 375 So.2d 270 (Ala. 1979), vacated and remanded,

_____U.S.____, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980), which is now pending before it on remand from the United States Supreme Court. The letter stated that the Alabama Supreme Court's pending decision in the Ritter case would either moot the State of Alabama's petition in this Court, or would underscore the errors which the panel had made concerning certain crucial issues of Alabama law.

5. On March 9, 1981, the panel issued a per curiam opinion which extended its original opinion, and which denied the Petition for Rehearing before the panel in all other respects.

6. Apparently, no order has yet been issued concerning the State of Alabama's Suggestion for a Rehearing En Banc. Despite diligent efforts by the undersigned attorney, including several telephone calls to both the New Orleans and the Atlanta Offices of the Clerk, he has been unable to determine the status of the

Suggestion for Rehearing En Banc.

7. The State of Alabama is not requesting that an immediate decision be made on the Suggestion for Rehearing En Banc, since the State still believes that such a decision should be held in abeyance until the Alabama Supreme Court issues its decision in the Ritter case, as discussed in paragraph 4 of this motion.

8. However, the State of Alabama does need to know whether its previously filed Suggestion for Rehearing En Banc is still pending, or is being held in abeyance as requested in its January 27, 1981 letter to this Court, or has been denied.

9. Since apparently no one in either office of the Clerk knows exactly what the present status of the State's Suggestion for Rehearing En Banc is, only this Court can inform the State of Alabama of that status.

WHEREFORE, for the foregoing reasons, the State of Alabama respectfully requests that this Court issue an order stating whether the State's previously filed Suggestion for Rehearing En Banc is still pending, is being held in abeyance or has been denied. In the alternative, the State of Alabama respectfully requests that this Court inform the Clerk's Office about the status of the Suggestion for Rehearing En Banc and direct the Clerk's Office to notify the parties of that status.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL
By-

/s/ Ed Carnes
ED CARNES
Assistant Alabama
Attorney General

CERTIFICATE OF SERVICE

I certify that I have served copies of the foregoing Motion on Petitioner-Appellant by mailing copies, postage prepaid to his attorneys as follows:

Hon. John R. Carroll
Hon. Dennis N. Balske
1001 South Hull Street
Montgomery, AL 36104

Hon. Stephen A. Reiss
2555 M Street N.W.
Washington, D.C. 20037

Done this the 11th day of March, 1981.

/s/ Ed Carnes
ED CARNES
Assistant Alabama
Attorney General

ADDRESS:

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APPENDIX H

Mar. 20, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 79-2674

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner,
Alabama Board of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of
Alabama

O R D E R:

IT IS ORDERED that the appellees' motion for clarification of en banc petition status is denied.

/s/ Robert S. Vance
UNITED STATES CIRCUIT
Judge

APPENDIX I

John Louis EVANS, III, Petitioner,

v.

Robert G. BIRTTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison, Respondents.

Civ. A. No. 79-0200-H.

United States District Court,
S. D. Alabama, S. D.

June 11, 1979.

MEMORANDUM OPINION

HAND, District Judge.

The petitioner, presently incarcerated on death row at Holman Prison Unit under a death sentence imposed by the Circuit Court of Mobile County, brings this action seeking habeas corpus relief from such sentence pursuant to Title 28 U.S.C.A., § 2254. The facts leading up to the conviction of the petitioner have been set out by the Alabama Court of

Criminal Appeals in Evans v. State, 361 So. 2d 654, 655-62 (Ala. Cr. App. 1977), and need not be repeated here. The petitioner was convicted of capital murder by a jury in the Mobile County Circuit Court on April 26, 1977 and, following a presentence hearing on April 27, 1977, the trial judge accepted the death penalty sentence returned by the jury. In October of 1977 the conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, id., and these decisions were affirmed by the Supreme Court of Alabama in May of 1978. Id. at 666. Evans filed a petition for a writ of certiorari in the United States Supreme Court on November 16, 1978, but the petition was denied on February 21, 1979. Evans v. Alabama, ___ U.S. ___, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979) (Marshall & Brennan, JJ., dissenting). On March 1, 1979, the Alabama Supreme Court entered an order requiring that Evans be

executed in accordance with the sentence on April 6, 1979. On April 5, 1979 the United States Supreme Court, through Justice Rehnquist, stayed the scheduled execution in response to a next-friend application for habeas corpus filed by petitioner's mother. Evans v. Bennett, ___ U.S. ___, 99 S. Ct. 1481, 59 L. Ed. 2d 756 (1979) (Rehnquist, J.). This stay was later dissolved by a unanimous vote of eight members of the Court. Evans v. Bennett, ___ U.S. ___, 99 S. Ct. 1481, 59 L. Ed. 2d 756 (1979). The Alabama Supreme Court set a new execution date of April 27, 1979, which was stayed by this Court on April 20th pending the final adjudication on the merits of the habeas corpus petition presently before the Court.

The petitioner sets out two general grounds for habeas relief: the trial judge erred in failing or refusing to instruct the jury in his case on the elements

constituting a prima facie case of robbery; and the Alabama death penalty statute under which the petitioner was convicted and sentenced is unconstitutional. The Court is convinced that jurisdiction properly lies in this Court to consider these issues pursuant to Title 28 U.S.C.A. § 2254.

I.

The petitioner contends that the trial judge's failure to instruct the jury on the elements of robbery violated his right to due process of law. There is no question but that the jury was not so instructed, the oral charge of the trial judge reading in perinent part as follows:

> The charge against the defendants is that they did unlawfully, intentionally, and with malice aforethought, kill Edward Nassar during the course of a robbery. The law of Alabama provides that

anyone who, during the course of a robbery, intentionally kills the victim, is guilty of this offense, and the punishment for this offense is death by electrocution. . . Now, the State must prove that [the defendants] intentionally killed Mr. Nassar. Unless there is an actual or positive intent to kill, they are not guilty of the crime with which they are charged. The intentional killing is a willful killing, an act governed by the will of the individual committing the same. The indictment further charges that they committed the act with malice. Malice means hatred or hostility toward another. It doesn't necessarily mean a personal ill will. When associated with murder, or a killing of this kind, it means an unlawful act, willfully

done, without just cause or legal excuse. It is that mental state or condition which prompts one to do an unlawful act without legal justification. It has also been defined as that condition of mind which shows a heart, regardless of social duty, totally bent on mischief.

. . .

(Transcript, pp. 223-24). Evans and his co-defendant, Wayne Ritter, had three attorneys representing them during this trial. None of these attorneys raised any objection to the oral charge given the jury by the trial court.

Evans' indictment charged that he violated section 13-11-2(a)(2) of the Alabama Code of 1975, which provides, in pertinent part, that:

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the

> defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:
>
> * * *
>
> (2) Robbery or attempts thereof when the victim is intentionally killed by the defendant. . . .

The petitioner contends that the trial judge's failure to instruct the jury on the elements of robbery before they considered his guilt or innocence on the charges constituted a violation of his due process rights, arguing that in order to find the petitioner guilty, it was incumbent upon the jury to find beyond all reasonable doubt that a robbery and an unlawful killing had taken place.

And, of course, the due process clause protects criminal defendants from conviction in a case where there has not been "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970).

In most cases it might be proper for an Alabama appellate court to reverse and remand a conviction under the statute for failure to give such an instruction, since there is no question but that no defendant should be convicted by a jury that has not been fully charged on all elements making up the crime charged. The instant case is rather unique, however, in that the petitioner had pled guilty, voluntarily and with full knowledge of his Boykin rights, on four separate occasions, at least once before the jury, in that counsel for the petitioner raised no

objection to the court's failure to so instruct, and in that this case is in this Court by means of collateral attack rather than direct appeal. This Court is of the opinion that the trial judge erred in failing to instruct the jury on the elements of robbery, but that such error was harmless or in any event did not result in any fundamental unfairness. See Bradley v. Wainwright, 561 F. 2d 1200 (5th Cir. 1977). It cannot be said under the evidence presently before the Court that a properly charged jury might have reached a different verdict, e.g., Henderson v. Kibbe, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977), so it is quite clear that no constitutional error justifying habeas corpus relief is present.[1]

[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 119a - 128a, infra.

Even if the Court were persuaded that the trial court's failure to instruct the jury on the elements of robbery amounted to a violation of the petitioner's due process rights, habeas relief would be foreclosed by the petitioner's admitted failure to raise a contemporaneous objection at trial to the omitted instruction. Clearly petitioner and his admittedly competent counsel were given the opportunity to object to the purportedly erroneous omission. Under Alabama law as it stood at the time of this trial, no defect in an oral charge was to be reviewed on appeal unless a timely objection had been made. E.g., Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977). While the rule has recently been relaxed by an amendment to Rule 39(k) of the Alabama Rules of Appellate Procedure that permits the Supreme Court to note any plain error in the proceedings, the prior rule is

applicable to this case. Of course, the fact that direct appeal is barred does not preclude this Court from considering the issues on a habeas corpus petition, but it is incumbent upon a party that has violated a state contemporaneous objection rule to make a showing of cause for or prejudice from the procedural default before the procedural default may be waived in federal court. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 86-87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594, 608 (1977); Spinkellink v. Wainwright, 578 F. 2d 582, 591-92 (5th Cir. 1978). In the instant case the only cause for the procedural default is the conclusion of the petitioner's trial counsel that no instruction was necessary, and there is simply no evidence that counsel was incompetent or inadequate. In addition, there is no prejudice at all flowing from the procedural default since there is

little if any likelihood that any other verdict would have been reached by the jury. Accordingly, the Court is of the opinion that habeas relief is not available to the petitioner herein for the trial court's failure to instruct the jury on the elements of robbery.[2]

II.

The second portion of the petitioner's habeas attack challenges the propriety of the Alabama Death Penalty Statute on various constitutional grounds. The petitioner raises seven specific constitutional objections to the Alabama statute, each of which is considered separately below by the Court.

Before considering the petitioner's various challenges, it is necessary to review the Alabama statutory scheme for the imposition of the death penalty. The Court notes at the outset that the Alabama statute was enacted in 1975, after

the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), but prior to the 1976 death penalty cases of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); and Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

The Alabama statute permits jury imposition of the death penalty for seven specified cases of felony murder,[3] for murder of any peace officer while on duty or because of some official or job-related act of such a peace officer while on duty,[4] for murder committed while the defendant is under a sentence of life imprisonment,[5] for first degree murder for

remuneration or pursuant to a contract,[6] for murder resulting from the intentional killing of a person by willfully setting off or exploding dynamite dangerously near a vessel, railroad car, and inhabited or uninhabited dwelling, or certain buildings,[7] for multiple first degree murders,[8] for first degree murder of a public official stemming from or related to the official's position, acts, or capacity,[9] for any murder committed by any defendant who in the 20 years preceding the crime was convicted of murder in the first or second degree,[10] and for murder of any witness subpoenaed to testify against the defendant.[11]

In death penalty cases, if the jury finds the defendant not guilty of capital murder it must return a verdict of acquittal and the defendant is to be discharged. If the jury is unable to agree on a verdict of guilty or not guilty, or

if the jury is unable to agree on the imposition of the death penalty, then the trial court may enter a judgment of mistrial. After such a mistrial, the defendant may be once again tried for the aggravated offense or for a lesser, non-aggravated offense carrying a lighter sentence. Ala. Code, § 13-11-2(c).

In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required by section 13-11-3 to hold a pre-sentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole. These are the only options for the sentencing authority. At this hearing the court is to receive all evidence relevant to sentencing, particularly evidence reflecting upon the mitigating and aggravating circumstances set out in sections 13-11-6 and 13-11-7.[12] The Court is permitted to consider any

evidence that it considers to have probative value, regardless of its admissibility under exclusionary rules, with the caveat that the defendant be given a fair opportunity to rebut any hearsay statements.

Following this hearing, the trial judge must weigh the aggravating and mitigating circumstances revealed by the evidence and either accept the sentence of death imposed by the jury, or reject the jury's sentence and impose upon the defendant the sentence of life imprisonment without parole. Id., § 13-11-4. If the trial judge accepts the jury determination and imposes the death sentence, then the judge is required to set forth in writing findings of fact from the trial and the pre-sentence hearing that include, at the least, one or more of the statutory aggravating circumstances that has been found to exist and which is or

are deemed sufficient to support a sentence of death, and any of the statutory mitigating circumstances found to be present which the trial judge determines to be insufficient to outweigh the death sentence. Id., § 13-11-4(1) & (2).

Any capital murder conviction that results in imposition by the trial judge of the death penalty is automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Id., §§ 12-22-150, 12-22-240, 12-22-243, 13-11-5, and A.R.A.P. Rule 39(c).

A. Preclusion of jury consideration of lesser included offenses

Under the Alabama statute, the trial jury in a capital case is specifically precluded from considering any lesser offenses that might be revealed by the evidence. Ala. Code, § 13-11-2(a), and the petitioner contends that such a

preclusion is violative of both the Eighth and Fourteenth Amendments to the United States Constitution in that persons accused of capital crimes are denied due process of law, equal protection under the law, and are subjected to cruel and unusual punishment. As the petitioner notes at page 8 of his brief in support of the petition, Alabama is the only state that has adopted a post-Furman statute precluding consideration of lesser offenses in capital cases.[13]

On the due process contention, the petitioner argues that a jury that is precluded from considering lesser offenses is likely to resolve its doubts in favor of conviction where one or more of the elements of the offense charged is in doubt but the evidence clearly reveals that the defendant is guilty of some crime. In Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844

(1973), the United States Supreme Court was confronted with the issue of whether an Indian prosecuted under the Major Crimes Act, Title 18 U.S.C.A., §§ 1153 & 3242, was entitled to jury consideration of a lesser included offense when such lesser offense was not one of the crimes enumerated in the Act. A 6-3 majority of the court concluded that the defendant was entitled to such a lesser offense instruction, ruling that "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." 412 U.S. at 208, 93 S. Ct. at 1995, 36 L. Ed. 2d at 847, citing Fed. R. Crim. Proc. 31(c). This Court notes, however, that Keeble was a federal criminal prosecution, as were each of the earlier cases cited in the majority opinion as

of the petitioner on the lesser offense issue.

Nor does the Court find it persuasive that capital juries might, as suggested in Keeble, find a defendant guilty and impose the death penalty on an improper predicate because they are convinced that the defendant is guilty of some lesser offense, although they have reasonable doubt as to the evidence on the capital offense. The argument assumes that jurors will abdicate their responsibility and violate their oaths in the interest of punishing criminal conduct, without consideration of any disparity between the perceived crime and the punishment to be imposed, and that trial judges will fail to properly weigh the sufficiency of the evidence submitted to the jury. The record in capital cases does not support such a conclusion of abdication of responsibility, for there have been two

supporting the rule set out above. See Sansone v. United States, 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965); Berra v. United States, 351 U.S. 131, 76 S. Ct. 685, 100 L. Ed. 1013 (1956); Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980 (1895). The Keeble Court's opinion is therefore limited to instructions in federal criminal cases, for there is no language in the opinion that would, as the petitioner herein seeks to do, require states to follow the Federal Rules of Criminal Procedure. Nor can it be argued that the failure to instruct on lesser offenses violates the due process clause, for the Keeble Court acknowledges that such a failure has never been construed to violate the due process clause. 412 U.S. at 213, 93 S. Ct. 1993, 36 L. Ed. 2d at 850. On this basis, this Court is of the opinion that Keeble does not stand as valid authority for the due process claims

acquittals and three mistrials in cases arising under the Alabama statute. First Stipulation between the Parties, no. 7. Indeed, there is a forceful argument favoring capital defendants in that the preclusion of lesser offenses makes it incumbent upon the state prosecutor to establish that the defendant is guilty as charged and that the defendant should receive the death penalty for the crime. If one juror is convinced that the death penalty is not proper under the circumstances, then no conviction can be obtained under the Alabama statute, although the defendant may be subject to retrial if a mistrial is declared. This Court would rather presume that jurors, especially in a capital case, will be true to their oaths and return verdicts in accordance with the facts and the law, rather than adopting petitioner's view that the jury can be expected to abdicate

its responsibility.[14] Indeed, to follow the petitioner's reasoning the Seventh Amendment would become a mockery in any criminal case, since no juror could be presumed to abide by his or her oath in considering issues presented.

A different due process contention set forth by the petitioner respecting the lesser offense issue argues the instruction entitlement has been specifically required in capital cases by the Supreme Court in Gregg. This position evidently results from a misreading of Gregg, for no such requirement is present. The Gregg Court merely held that the jury discretion inherent in an instruction permitting conviction on a lesser offense was not unconstitutional as permitting arbitrariness and capriciousness in the jury deliberations, and in no way held that such lesser offense instructions were required. 428 U.S.at 199, 96 S. Ct.

2909, 49 L. Ed. 2d at 889. This Court is convinced that the fact that each of the state schemes that have received Supreme Court approval (Georgia, Florida, and Texas) permit lesser offense instructions does not invalidate the Alabama statute in this respect as an attempted response to the Furman concerns of arbitrary, capricious, or standardless jury decisions in capital cases that resulted in the death sentence being imposed freakishly and/or wantonly. And, of course, it is clear that a jury-only sentencing scheme that permits consideration of lesser included offenses is indicative of the concerns voiced in Furman. See Roberts v. Louisiana, 428 U.S. 325, 334-35, 96 S. Ct. 3001, 49 L. Ed. 2d 974, 982 (1976) (plurality opinion).

A final point militating against the due process arguments advanced by the petitioner on the lesser offense issue is the

fact that adequate safeguards exist within the statutory framework to ensure that no defendant who properly should be convicted of a lesser offense will be executed after imposition of the death penalty. First, assuming arguendo juror misconduct as alleged by the petitioner, it would still be necessary for the trial judge to weigh the aggravating and mitigating circumstances before determining whether or not to accept the sentence imposed by the jury. If the evidence does not support a conviction under the capital statute, then the trial judge should be able to ascertain this in the pre-sentence hearing and sentence the defendant to life imprisonment without parole. But perhaps the trial judge is assumed to violate his oath also. If so, then the sufficiency of the evidence must still be considered by appellate courts. In the Court's view, the only way that an Alabama defendant

could possibly be executed improperly as a result of the failure to charge on lesser included offenses would be for twelve citizens to violate their oaths as jurors and for no less than eight judges to violate their oaths as jurists.

The petitioner further alleges that the preclusion of lesser included offenses violates the equal protection rights of capital defendants, since all defendants in non-capital cases have the privilege of receiving lesser included offense instructions. This contention is piggy-backed on the due process contention that the failure to so instruct permits juries to convict in capital cases on less than guilt proven beyond a reasonable doubt. If, of course, the evidence was that the statute had permitted juries to convict on less than proof beyond a reasonable doubt, then the statute would unquestionably be unconstitutional. See Addington v.

Texas, ___ U.S. ___, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re Winship, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 378 (1970) (Harlan, J., concurring). But here the Court has concluded that while abdication of juror responsibility is possible in any case, there is nothing in the Alabama statute that makes it more likely to occur in cases under the statute, nor does this Court assume that "juries will disobey or nullify their instructions." Jurek v. Texas, 428 U.S. 262, 279, 96 S. Ct. 2950, 2959, 49 L. Ed. 2d 929, 942 (1976) (White, J., concurring). Thus, without piling speculation upon assumptions, it cannot be said that the Alabama statutes impose a different standard of proof in capital cases than is present in non-capital cases.

A second equal protection contention is that capital defendants are not accorded treatment equal to that of

non-capital defendants, since non-capital defendants are afforded the opportunity to have juries instructed on lesser included offenses. This argument is also without merit, for the state clearly has a compelling interest in prescribing the process by which those upon whom it seeks to impose the ultimate penalty of death are to be tried. The Court has noted supra in connection with review of the Keeble decision that there is no fundamental right to a lesser offense instruction. Since this Court finds a rational basis for the state's distinction between capital and non-capital defendants, the allegations of equal protection violations are without merit.

The final argument advanced by the petitioner attacking the preclusion of lesser included offenses alleges violations of the Eighth Amendment's proscription of cruel and unusual punishment.

The petitioner alleges that this portion of the statute fails to reflect "contemporary community values" and "contemporary standards of decency," an Eighth Amendment requirement. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 294-97, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 955-57 (1976). Again, the petitioner piggy-backs his contention on the assumption that the Alabama system permits a conviction in capital cases on less than proof beyond a reasonable doubt. Such a system, this Court agrees, would be abhorrent to modern community values and contemporary standards of deceny, but here, as noted earlier, the petitioner piles a supposition on top of an assumption to achieve the position that the burden of proof is lessened. This is simply too conjectural to bear consideration by the Court.

A second argument advanced by the petitioner on Eighth Amendment grounds contends that since Alabama is the only state that precludes lesser included offenses, it amounts to cruel and unusual punishment. This Court acknowledges that Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), indicates that legislative attitudes in other areas have some relevance to determining whether or not a certain penalty is excessive or unreasonable. The Georgia rape statute was struck down in that case as being excessive in part because Georgia was the only state that permitted the death sentence for rape. In the instant case, however, the Court is not concerned with any penal distinction between the schemes in the various states, but rather with a procedural distinction. Coker is in no way directed toward procedural distinctions under various death

penalty statutes, and the Court is not persuaded that it has any relevance to the Eighth Amendment question in this case. The Court is convinced that the fact that Alabama is the only state that employs the procedural preclusion of lesser included offenses has no Eighth Amendment implications, and that the petitioner is entitled to no habeas corpus relief on this point.

In conclusion with respect to the preclusion of lesser included offenses, the Court is content that such offenses are not constitutionally required to be submitted to the jury, that such a system does not lessen the burden of proof borne by the prosecution, that the rights of capital defendants are adequately protected by the statutory scheme, even assuming abdication of responsibility by jurors, and that the preclusion is not on its face abhorrent to either the Eighth or Fourteenth

Amendments to the United States Constitution.

B. The Sentencing Authority Under the Alabama Statute

The petitioner's second area of challenge to the constitutionality of the Alabama death penalty statute is concerned with the requirement that a capital jury that finds a defendant guilty must impose the death sentence or impose no penalty at all. The petitioner contends that this provision is conducive to arbitrary or capricious jury decisions in death penalty cases, since it permits juries to refuse to impose the death sentence in those cases in which they do not feel that the defendant deserves to die. This concern led to the rejection of mandatory death penalty statutes in North Carolina and Louisiana by the United States Supreme Court, since it was felt by the plurality of the Court

that the unbridled jury discretion condemned by Furman could not be remedied by a mandatory statute removing all sentencing discretion from the jury, because such a statute encourages jurors to consider the harshness of the penalty while deliberating on the guilt or innocence of the capital defendant. Woodson, 428 U.S. at 303, 96 S. Ct. 2978, 49 L. Ed. 2d at 960; Roberts, 428 U.S. at 335, 96 S. Ct. 3001, 49 L. Ed. 2d at 982. The question for this Court is whether the Alabama statutory scheme permits such unchanneled jury discretion in capital cases as to merit the death penalty to be imposed "freakishly or wantonly." See Furman v. Georgia, 408 U.S. 238, 309-10, 92 S. Ct. 2726, 33 L. Ed. 2d 346, 390 (1976) (Stewart, J., concurring).

At the outset, the distinctions between the Alabama statute and those struck down in Woodson and Roberts should be noted. The North Carolina statute struck

down in Woodson made the death penalty mandatory for all first degree murders.[15] Thus the only discretion allowed the jury was the decision whether the defendant was guilty of first degree murder or some other homicide offense. The Louisiana statute struck down in Roberts required jury imposition of the death penalty in all cases of conviction for first degree murder, aggravated rape, aggravated kidnapping, or treason.[16]

In Woodson, the Supreme Court struck down the statute for three, distinct reasons. First was the concern that the mandatory nature of the statute was abhorrent to contemporary standards requiring rejection of the mandatory imposition of the death penalty for every person convicted of a specified offense. 428 U.S. at 288-301, 96 S. Ct. 2978, 49 L. Ed. 2d at 951-59. The Court's second concern was that the mandatory nature of the

statute was conducive to unchanneled jury discretion since it permitted jurors to weigh the harshness of the penalty and thus determine, without standards, which first degree murderers should live and which should die. Id. at 302-03, 96 S. Ct. 2978, 49 L. Ed. 2d at 959-60. Finally, the Court rejected the statute for its failure to permit consideration by the sentencing authority of the particularized aspects of the character and record of defendants upon whom the death penalty was sought to be imposed. Id. at 303-05, 96 S. Ct. 2978, 49 L. Ed. 2d at 960-62.

While the Louisiana statute narrowed the scope of the offenses for which death could be imposed, the Roberts decision found the same problems that had inflicted the North Carolina statute especially "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," 428

U.S. at 333, 96 S. Ct. at 3006, 49 L. Ed. 2d at 981, and the failure to provide "standards to channel jury judgments [or permit] review to check the arbitrary exercise of the capital jury's de facto sentencing discretion." Id. at 335, 96 S. Ct. at 3007, 49 L. Ed. 2d at 982.

Review of the Alabama statute reveals that none of the concerns leading to the reversals in Woodson and Roberts are present. At the outset, the Alabama statute is not mandatory, although the petitioner hotly contests this fact. The sentencing authority is the trial judge, not the jury, and the judge is empowered to sentence a convicted capital defendant to the death penalty or life imprisonment without parole. Ala. Code, § 13-11-4. The Court, accordingly, does not perceive there to be any mandatory death penalties under the Alabama statute. The fact that death is the only punishment that the jury

can prescribe does not put the Alabama statute on a par with North Carolina's and Louisiana's invalid statutes, since the jury is not the ultimate sentencing authority, as it was in both North Carolina and Louisiana. Nor does the Alabama scheme induce the type of unchanneled jury discretion described in Woodson and Roberts, since the Alabama juries are given the option of convicting the defendant and imposing the death penalty, mistrying the case, or returning a verdict of acquittal. The Alabama jury has no option, as did those in North Carolina and Louisiana, of deciding that the death penalty is too harsh and thus convicting the defendant of a lesser offense to avoid the imposition of such a harsh punishment. Nor is it likely that the statutory scheme will lead to capital punishment being freakishly or wantonly imposed, since it is to be imposed by the

jury in every capital case in which all twelve jurors agree on that punishment, and in none other. Finally, the facet of the Alabama process permitting imposition of sentence by the trial judge is a factor present in neither Woodson nor Roberts, and is, in the opinion of this Court, a valuable aid in the sentencing process. See Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 923 (1976). The final factor leading to reversal in Woodson and Roberts—the lack of individualized consideration by the sentencing authority of the character and record of the defendant in each case—is not present under the Alabama statute, since Alabama requires the trial judge to consider eight aggravating and seven mitigating factors in every case before the death penalty is imposed, and the trial judge is required to enter on the record specific findings of fact with respect to these factors.

Ala. Code, §§ 13-11-3, 4, 6, & 7. Accordingly, this Court finds nothing in the sentencing authority provided under the Alabama statute that has been condemned in either Woodson or Roberts.[17]

In summary, the Court is not persuaded that the Alabama statute runs afoul of constitutional punishment by requiring capital juries to fix the punishment at death on a vote of conviction. The petitioner goes astray by assuming that the jury is the sentencing authority; it is not. "The jury, when deliberating on a verdict, is only concerned with the issue of the defendant's guilt or innocence." Jacobs v. State, 361 So. 2d 640, 646 (Ala. 1978) (Torbert, C. J., concurring in part and dissenting in part). The jury, having reached a verdict, has absolutely no input into the sentencing process. This approach, adopted in response to the Furman concern of unchanneled jury discretion, was approved

under similar circumstances in Proffitt, where the Florida statute was upheld. The only distinction between the Florida statute and the Alabama statute is that Florida juries are permitted to consider lesser included offenses. If a Florida defendant is convicted of a statutorily defined capital offense, the pre-sentence hearing is conducted before judge and jury and the jury's sentence, which is determined by a majority vote, is merely advisory to the trial judge, who stands as the sentencing authority. Proffitt, 428 U.S. at 248-49, 96 S. Ct. 2960, 49 L. Ed. 2d at 920-21. The Florida statute has been upheld on constitutional grounds and this Court is content that the protections afforded by Florida are adequately and similarly afforded under the Alabama statute.

C. The Prosecutorial Burden of Proof With Respect to Aggravating Circumstances

The petitioner next attacks the constitutionality of the Alabama statute on the basis that the statutory sentencing scheme does not require the state to prove the existence of aggravating circumstances beyond a reasonable doubt, since a trial judge who fixes the punishment at death is required only to set out "one or more of the aggravating circumstances . . . which it finds exists" and "any of the mitigating circumstances . . . which it finds insufficient to outweigh the aggravating circumstances." Ala. Code, § 13-11-4(1) & (2). The petition contends that such a process is violative of the due process clause of the Fourteenth Amendment.

The petitioner correctly notes that Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), has established the rule that the sentencing

process, just like the trial itself, must comport with the fundamental principles of due process:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 358, 97 S. Ct. at 1205, 51 L. Ed. 2d at 402 (citations omitted). The

petitioner's position is that since the aggravating circumstances are elements of the punishment, proof of these elements ought to be required beyond a reasonable doubt as a fundamental due process protection.

The petitioner's position is untenable, in this Court's view, for he confuses the procedural with the substantive. Substantively, no defendant may be convicted under the Alabama death penalty statute without proof beyond a reasonable doubt of a violation of some provision of section 13-11-2(a) of the Alabama Code. Due process entitles defendants to nothing more. Procedurally, a defendant who has been convicted of a capital crime is entitled to have the trial judge consider the statutorily prescribed aggravating and mitigating circumstances, and a trial judge imposing a death sentence is required to enter specific findings respecting such

circumstances. During this process the defendant is entitled to put on evidence in favor of mitigation or in opposition to aggravation, but the petitioner here contends that the capital defendant has a fundamental right to have any aggravation present in his case to be proved beyond a reasonable doubt. If the question of aggravation in capital cases under the Alabama statute were submitted to the jury, then this Court would be inclined to follow the lead in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978), and State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), and rule that the jury must be instructed that aggravating circumstances must be established by proof beyond a reasonable doubt before the jury could consider such circumstances in deliberating a death sentence case. Under Alabama law, however, the trial judge is the sentencing authority upon whom rests the burden of

weighing the aggravating and/or mitigating circumstances. The defendant cannot, as far as the Court can ascertain, be convicted of a capital crime under Alabama statute without proof beyond a reasonable doubt of at least one of the statutorily prescribed aggravating circumstances, since a reading of the statute reveals that the aggravating circumstances set out in section 13-11-6 actually define the capital crimes set out in sections 13-11-2(a)(1)-(14).[18]

The only problem that could result would be in an instance in which a sentencing judge considers an aggravating circumstance that is not definitional of the crime for which the defendant has been convicted, such as, for example, a judge in a robbery-murder case [§ 13-11-2(a)(2)] finding that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function

[§ 13-11-6(7)]. In this instance there would be a serious due process issue, for the proof supporting the conviction would not necessarily support the finding of the aggravating circumstance. There is no evidence before the Court that this has happened in any of the 50 or so cases that have been tried under the statute, and is not a matter for concern in this case. The Court cites the example only to acknowledge that the petitioner's concern has a conceivable basis, but not such as would require the invalidation of the entire statutory scheme.

In conclusion, this Court is of the opinion that the fact that the Alabama statute does not specifically require proof beyond a reasonable doubt of aggravating circumstances does not require invalidation of the statute. The aggravating circumstances are relevant only as guidance to the sentencing

authority, they do not come into play until after the capital defendant has been convicted, and such conviction cannot be obtained without proof beyond a reasonable doubt of the capital crime, which necessarily amounts to proof beyond a reasonable doubt of the underlying aggravating circumstances. The Court does not subscribe to the petitioner's contention that this finding is sufficient to require remand of the forty-three death sentences presently being served in Alabama for consideration by the various trial courts of whether any of the statutory circumstances were established beyond a reasonable doubt. As the Fifth Circuit noted in Spinkellink, supra at 610, this position is without merit for the jury verdict indicates that the aggravating circumstance underlying the capital crime was proved beyond a reasonable doubt.

D. The Delayed Sentencing Procedure

The petitioner contends that the Alabama process of vesting sentencing discretion in the trial judge following a jury verdict of guilty and jury imposition of the death penalty is constitutionally impermissible because it places upon the judge the intolerable burden of opting between a mere acquiescence in the jury's verdict or a refusal to accept a publicly pronounced unanimous verdict rendered by twelve members of the citizenry from which he is elected.

At the outset, the petitioner mischaracterizes the issue when he asserts that "the judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of 'refusing to accept' a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due."

Such reasoning assumes that the jury reached the decision to impose the death sentence after deliberations that included consideration of various other sentences. That is not the case in Alabama, where the jury's only duty is to determine the guilt or innocence of the capital defendant; a finding of guilt requires the jury to impose the death penalty to the exclusion of any other punishment. The Alabama sentencing authority is the trial judge and, accordingly, the jury verdict as to punishment must be characterized as advisory. This is similar to the Florida capital punishment scheme, except that in Florida the jury has the benefit of the pre-sentence hearing before they reach a verdict, they are not compelled to return a sentence of death, and the sentence is decided by a majority of the panel. Proffitt, 428 U.S. at 248-49, 96 S. Ct. 2960, 49 L. Ed. 2d at

920-21. The Florida framework was upheld in Proffitt, and this Court is not persuaded that the burden on an Alabama sentencing judge is any different from that on a Florida sentencing judge. Nor is the Court persuaded that a sentencing judge would abdicate his responsibility for political expediency as the petitioner suggests, since the record indicates that trial judges have on various occasions reduced jury imposed death sentences to life imprisonments without parole.[19] Accordingly, the Court is content that the petitioner's contentions on this point are without merit.

E. The Statutory Limitations on Mitigating Circumstances

The petitioner next contends that the Alabama statute is unconstitutional to the extent that it delimits the mitigating circumstances that the sentencing authority

may consider and weigh against the aggravating circumstances in making a sentence determination in a capital case. There is no question but that a statute that precludes consideration of relevant mitigating circumstances is unconstitutional.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death. . . . [W]e cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . [A] statute that prevents the sentencer in all capital cases from giving independent

> mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973, 990 (1978) (Emphasis in original) (Footnote omitted). Thus, it is clear that a statute which unduly limits the sentencer's authority in inquiring into mitigating factors cannot pass constitutional muster.

The petitioner contends that the seven mitigating factors set out in the Alabama statute, Ala. Code, § 13-11-7, are exclusive, relying upon the opinion of one member of the Supreme Court of Alabama. In Jacobs v. State, 361 So. 2d 640 (Ala. 1978), Chief Justice Torbert stated in a separate opinion that:

> The list of mitigating circumstances in section 13-11-7, Code of Alabama 1975, is exclusive, and the grounds argued by the petitioner do not fit within any of the seven enumerated factors in that section.

Id. at 648 (Torbert, C.J., concurring in part and dissenting in part). This Court, however, cannot be guided by one justice's opinion that forms no part of the opinion of the Court, especially when that opinion is directly contrary to the language of the statute. Section 13-11-3 provides, with respect to the pre-sentence hearing, that:

> In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any

such evidence which the court deems to have probative value may be received. . ..

The legislature clearly intended that the sentencer be permitted to consider any mitigating factor, not just those set out in the statute. Indeed, on rehearing in the Jacobs case, supra, six justices of the Alabama Supreme Court clarified the issue by quoting section 13-11-3 and emphasizing the portion respecting the introduction of any evidence and not just that reflecting upon the mitigating factors. Jacobs v. State, 361 So. 2d 640, 652 (Ala. 1978). The Supreme Court reaffirmed this position in Ex parte Cook, 369 So. 2d 1251 (Ala. 1978), where a death sentence was reversed and remanded to the trial court for a new sentence hearing in which the trial court was to consider any mitigating factor, not just the statutory factors. Since the case law reveals that the Supreme

Court of Alabama has read the statute as permitting consideration of any relevant mitigating factor, this Court is of the opinion that the petitioner's contentions on this point are without merit.[20]

F. Appellate Review Under the Alabama Statute

The petitioner next challenges the statutorily prescribed appellate review in death penalty cases, arguing that the Alabama scheme is not compatible with the level of review determined to be necessary in such cases by Gregg, Proffitt, and Jurek. The petitioner apparently takes the position that the statute is fatally defective for failing to require Alabama appellate courts to engage in the form of comparative review required of the Georgia Supreme Court in death penalty cases.

Under the Georgia statute, the Georgia Supreme Court automatically reviews

every case in which the death penalty is imposed and is directed by statute to consider the punishment and any errors enumerated in the appeal, and the Court is further directed to ascertain whether the jury verdict was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the jury's or the judge's findings of statutory aggravating circumstances, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Ga. Code Ann. § 27-2537 (Supp. 1975), cited in Gregg v. Georgia, 428 U.S. 153, 166-67, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 871 (1976). Additionally, when the death sentence is affirmed, the Georgia Supreme Court is required to include in its decision reference to similar cases that it has taken into consideration. Ga. Code Ann. § 27-2537(e) (Supp. 1975). In considering the statutory review

procedure in Gregg, the Supreme Court of the United States reasoned that:

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg, 428 U.S. at 206, 96 S. Ct. at 2940, 49 L. Ed. 2d at 893.

While the Georgia process is laudable in establishing objective sentencing

standards, the process was by no means required as a constitutional matter by the Gregg decision. The Florida appellate process upheld in Proffitt, for instance, provides for automatic review of death sentence cases by the Florida Supreme Court, but does not require that court to conduct any specific form of review. Fla. Stat. § 921.141(4) (Supp. 1976-77), cited in Proffitt v. Florida, 428 U.S. 242, 250, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 922 (1976). The Supreme Court noted in Proffitt, however, that by judicial construction the review function of the Florida Supreme Court is similar to that of the Georgia Supreme Court. 428 U.S. at 251, 96 S. Ct. 2960, 49 L. Ed. 2d at 922, citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).[21]

Conspicuously absent from the petitioner's brief on the review issue is any mention of the review procedures under

the Texas statute upheld in Jurek. The statute provides only for expedited review of death penalty decisions by the Texas Court of Criminal Appeals, without defining the review function of that Court. Tex. Code Crim. Proc., Art. 37.071(f) (Supp. 1975-76), cited in Jurek v. Texas, 428 U.S. 262, 269, 96 S. Ct. 2950, 49 L. Ed. 2d 929, 937 (1976). The Supreme Court was apparently satisfied that the limited circumstances under which the death penalty might be sought would serve to insure that the death penalty would be "imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances." 428 U.S. at 270, 96 S. Ct. at 2955, 49 L. Ed. 2d at 937, quoting State v. Jurek, 522 S.W. 2d 934, 939 (Tex. Cr. App. 1975).

It is apparent that the question for this Court is whether the review procedure

adopted by the Alabama statute properly requires appellate courts in capital cases to conduct their review in such a manner as will ensure that the death penalty is imposed only for the most serious crimes and only in circumstantially similar cases. This Court is of the opinion that the Alabama procedure does permit such comparative review and accordingly does not run afoul of Gregg, Proffitt, or Jurek.

As noted above, any death penalty is automatically reviewed by the Alabama Court of Criminal Appeals, even where, as with the petitioner here, the defendant does not desire such review.[22] Ala. Code § 13-11-5; see also §§ 12-22-150 & 12-22-243. Additionally, by judicial rule-making power, the Alabama Supreme Court is required to review any death penalty decision for which a writ of certiorari is sought. Ala. R. App. Proc. 39(c). The case law

under the Alabama statute makes it clear that the petitioner's contention that Alabama appellate courts do not engage in comparative review is without merit. In the very first case to interpret the statute, Jacobs v. State, 361 So. 2d .640 (Ala. 1978), the Alabama Supreme Court acknowledged its responsibility to consider the circumstances of other death penalty cases in reaching its decision:

> The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's automatic appeal statute, have been reversed and remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sentence of death. We are familiar with other cases reviewed by this Court in the last

> decade involving death sentences and we are convinced that the sentence here was not arbitrary or capriciously entered.

Id. at 644-45. In Clements v. State, 370 So. 2d 708 (Ala. Cr. App. 1978), the Alabama Court of Criminal Appeals specifically rejected the contention advanced by the petitioner here. Further, Beck v. State, 365 So. 2d 985 (Ala. Cr. App. 1978), stands as a specific example of comparative review by the Alabama Court of Criminal Appeals, which, after reviewing the facts, noted that "[t]he facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra. . . . It seems to us that the result is inescapable that the punishment, too, should be the same." Id. at 1005.

Besides comparative review, it is clear that the Alabama appellate courts

have devised another safeguard for capital defendants—independent appellate weighing of the aggravating and mitigating circumstances in each case. Evans v. State, 361 So. 2d 654, 662 (Ala. Cr. App. 1977). The Alabama Court of Criminal Appeals has specifically recognized its responsibility to do this on at least three occasions, see Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979); Thomas v. State, 369 So. 2d 71, 72 (Ala. Cr. App. 1979); Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), and various convictions have been reversed and remanded for trial court improprieties in conducting the sentencing hearing. E.g., Keller v. State (Ala. Cr. App. 1979); Ex Parte Cook, 369 So. 2d 1251 (Ala. 1978).

The record is clear that the review scheme permitted by the Alabama death penalty is compatible with the teachings of Gregg, Proffitt, and Jurek, since the

process ensures the adequacy of the trial and sentencing process and that the death sentence will be imposed uniformly for similar serious offenses, rather than freakishly or wantonly, as condemned by Furman.

G. Mandatory Nature of the Alabama Statute

The petitioner's final argument contends that, in spite of the fact that the Alabama statute is not on its face a mandatory death penalty statute, it has become by application an invalid mandatory statute of a nature condemned by Woodson and Roberts.

The petitioner predicates his argument upon a statistical analysis of the 65 cases tried under the present death penalty law in which sentence hearings have been held. In fifteen of the cases the prosecutor did not seek the death penalty at the sentence hearing, but such

punishment was actively sought in the other 50 cases. In 43 of these 50 cases the jury verdict of death was allowed to stand, while the other seven defendants received life imprisonment without parole. The petitioner argues that this 86% death penalty rate upon conviction stands as evidence that Alabama possesses a mandatory death penalty statute, contending that the figure indicates that trial judges are merely satisfying the unguided mandatory sentences returned by juries.

This argument is similar to that advanced in Spinkellink v. Wainwright, 578 F. 2d 582, 604-605 (5th Cir. 1978), where the petitioner contended that the admittedly constitutional statute[23] was being applied in an arbitrary and capricious manner. After considering the possibility that permitting collateral attacks in death penalty cases that seek to go behind a facially valid statute

would result in every substantive decision of a state court in a capital case being tried de novo in other courts, the Fifth Circuit concluded that:

> The Supreme Court in Proffitt, or in Furman, Gregg, Jurek, Woodson or Roberts, could not have intended these results. We understand these decisions to hold that capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute—and there can be no doubt that Florida has—which the state follows in determining which convicted defendants receive the death penalty and which

> recieve life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed.

Id. at 605 (footnote omitted). Admittedly, the petitioner here does not allege that application of the Alabama statute has been arbitrary or capricious in violation of Furman, but rather that it has been mandatory in violation of Woodson, Roberts, and Lockett. The Court, however, is not persuaded that any distinction exists. This Court is content that the Alabama death penalty process is constitutional under the decided cases and the fact that application of the constitutional process has resulted in a high rate of death penalty imposition does not serve to invalidate the constitutional process. Accordingly, the Court is of the opinion that the petitioner's contentions on this point are without merit.

The petitioner has introduced other statistics indicating that while the death sentence is imposed in only 18.6% and 14.7% of the felony murder cases brought under the constitutional statutes in Florida and Georgia, respectively, it has been imposed in 38.5% of the cases brought under the Alabama statute. Further, the death sentence has been imposed in only 43.3% of such cases in Florida and 27.2% of such cases in Georgia. While such figures do indicate a greater likelihood of execution for capital defendants in Alabama, they do not, in this Court's perception, reveal any constitutional infirmity in the Alabama system. There is no constitutional requirement of numerical or percentile equality in the sentencing procedures in various states; indeed, were the Alabama figure 100% this Court would not be constrained to find the system unconstitutional

in the absence of specific evidence of impermissible procedures. The Court is convinced that the fact that the Alabama statute carries a greater likelihood of imposition of the death penalty simply has no relevance to the constitutionality of the statute—it could well be that Florida and Georgia are improperly applying their constitutional statutes, or the reason for the large disparity could be any of a large number of other reasons. This Court is simply unwilling to accept an impact test in passing upon the constitutionality of a state statute, where the text reveals only differing results from those cases in other jurisdictions.

III.

Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), determined, for various reasons, that the imposition of the death penalty in many cases constitutes cruel and unusual

punishment in violation of the Eighth Amendment to the United States Constitution. Two justices considered the punishment cruel and unusual per se, 408 U.S. at 257, 314, 92 S. Ct. 2726, 33 L. Ed. 2d at 360, 393 (Brennan & Marshall, JJ., concurring), one concluded that the punishment was being applied in a discriminatory manner, 408 U.S. at 240, 92 S. Ct. 2726, 33 L. Ed. 2d at 350 (Douglas, J., concurring), while two others were troubled by the apparent arbitrariness and capriciousness with which the punishment was imposed. 408 U.S. at 306, 310, 92 S. Ct. 2726, 33 L. Ed. 2d at 388, 390 (Stewart & White, JJ., concurring).

The Alabama statute was adopted in the hope of eliminating the arbitrariness and capriciousness spoken of in Furman, and this Court is of the view that such purposes have been achieved. Since Furman, the Supreme Court has expressed in Gregg

and its companion cases the requisites of a constitutional death penalty system. First, the irretrievable nature of the death penalty requires special precautions in the process. Gregg, 428 U.S. at 188, 96 S. Ct. 2909, 49 L. Ed. 2d at 883. The Alabama framework certainly provides such special precautions, by limiting the types of felonies for which the punishment is authorized, by requiring unanimous jury agreement on the penalty to be imposed, by providing guidelines for the sentencing authority, and by providing various safeguards in the appellate review system. The "untrammeled jury discretion" which concerned Justice Douglas in Furman has been eliminated by placing sentencing authority with the trial judge, leaving the jury only to decide guilt or innocence. The bifurcated procedure "is more likely to ensure elimination of the constitutional deficiencies

identified in Furman." Gregg, 428 U.S. at 192, 96 S. Ct. at 2926, 49 L. Ed. 2d at 885. This Court is content that the leading distinction between Furman and Gregg is that in Gregg, the Georgia legislature had provided "an adequate means of controlling the necessary exercise of jury discretion." England, Capital Punishment in the Light of Constitutional Evolution: An Analysis Between Furman and Gregg, 52 Notre Dame Law, 596, 604-05 & n. 59 (1977). The Court here perceives no problem with jury discretion under the Alabama statute. The Gregg decision also favorably noted the Georgia appellate scheme as being a safeguard against many of the Furman problems, 428 U.S. at 198, 96 S. Ct. 2909, 49 L. Ed. 2d at 888, and the Alabama statute, though admittedly different in some respects, effectively provides the same safeguards.

In conclusion, the Alabama scheme requires as a prerequisite to imposition of the death penalty that a defendant be convicted by a jury of a specified homicide offense of an aggravated nature and that the trial judge enter specific findings as to the particularized aspects of the case, with adequate appellate procedures to safeguard the process. The Court is content that there is no longer "no meaningful basis for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not." Furman, 408 U.S. at 313, 92 S. Ct. at 2764, 33 L. Ed. 2d at 392 (White, J., concurring). Accordingly, the petition for writ of habeas corpus is hereby DENIED, and the stay of execution heretofore entered on April 20, 1979 is hereby DISSOLVED.

[Footnotes begin on next page.]

[1]The petitioner is totally without proof that he suffered any prejudice from the failure to instruct the jury on the elements of robbery. At every stage of the proceedings in the case he admitted that he had robbed and murdered Edward A. Nassar. He first confessed to the F.B.I. in Little Rock, Arkansas; next to the Mobile County Grand Jury that returned the indictment against him; then he admitted the robbery-murder at arraignment; and his final confession was before the jury during his trial.

[2]The Court is aware of no less than two other grounds upon which habeas relief for the failure to instruct the jury on robbery is due to be denied. First, alluded to in the text, supra, is the fact that the trial judge's error can at worst be characterized as harmless, since the inclusion of such an instruction would not, under the circumstances, have resulted in any different result. Where an error in a state court proceeding is harmless beyond a reasonable doubt, federal habeas corpus relief is not available. E.g., Milton v. Wainwright, 407 U.S. 371, 377-78, 92 S. Ct. 2174, 33 L. Ed. 2d 1, 6-7 (1972); Washington v. Maggio, 540 F. 2d 1256, 1257 (5th Cir. 1976). Since the failure to instruct can only be characterized as harmless beyond a reasonable doubt, habeas corpus relief is due to be denied.

A second, independent, additional reason for denying habeas corpus relief for the failure to instruct on the elements of robbery results from the fact that the conviction was predicated not only on a jury verdict, but also upon a voluntarily made informed guilty plea by the petitioner. Accordingly, the conviction attacked here is not just the

result of the jury's deliberations, but additionally is the result of informed conduct on the part of the petitioner. The fact that the matter was subsequently tried to a jury resulted not from a rejection of the guilty plea by the trial court, but rather from Alabama practice of submitting all capital cases to a jury, regardless of what plea is entered. See Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979). Having pled guilty to the charges, the petitioner is thereby estopped to challenge the validity of the conviction on other than jurisdictional grounds. See, e.g., Richardson v. Beto, 472 F. 2d 169 (5th Cir. 1973).

[3]The specified crimes are "[k]idnapping for ransom or attempts thereof when the victim is intentionally killed by defendant," Ala. Code, § 13-11-2(a)(1), "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant," id., § 13-11-2(a)(2), "[r]ape when the victim is intentionally killed by the defendant," id., § 13-11-2(a)(3), "carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant," id., "[n]ighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant," id., § 13-11-2(a)(4), "[i]ndecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant," id., § 13-11-2(a)(8), and "[m]urder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force

with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft," id., § 13-11-2(a)(12).

[4]Id., § 13-11-2(a)(5).

[5]Id., § 13-11-2(a)(6).

[6]Id., § 13-11-2(a)(7).

[7]Id., § 13-11-2(a)(9). The specified public buildings are set out in section 13-2-61.

[8]Id., § 13-11-2(a)(10).

[9]Id., § 13-11-2(a)(11).

[10]Id., § 13-11-2(a)(13).

[11]Id., § 13-11-2(a)(14).

[12]Section 13-11-6 provides that:

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under a sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempt to commit, rape, robbery, burglary, or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was espeically heinous, atrocious, or cruel.

Section 13-11-7 provides that:

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime.

[13]Since the 1972 Furman decision thirty-five states and the United States Government have redrafted death penalty legislation. England, Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg, 52 Notre Dame Lawyer 596, 601 (1977).

[14]The only problem that the Court ascertains in this area is the practice in state courts in capital cases of not instructing the jury of their right to mistry the case. Since the statute

specifically sets forth this possibility, it is probably the better practice that juries be so instructed. However, this Court is not persuaded that the failure to so instruct is constitutionally infirm.

[15]The North Carolina statute provided that:

> Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975), quoted from Woodson v. North Carolina, 428 U.S. 280, 286, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 950 (1976).

[16]The Roberts plurality decision contrasted the North Carolina and Louisiana statutes:

> There are two major differences between the Louisiana and North

> Carolina statutes governing first-degree murder cases. First, the crime of first-degree murder in North Carolina includes any willful, deliberate, and premeditated homicide and any felony murder, whereas Louisiana limits first degree murder to five categories of homicide—killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. Second, Louisiana employs a unique system of responsive verdicts under which the jury in every first-degree murder case must be instructed on the crimes of first-degree murder, second-degree murder, and manslaughter and must be provided with the verdicts of guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. . . . [b]y contrast, in North Carolina instructions on lesser included offenses must have a basis in the evidence adduced at trial.

Roberts v. Louisiana, 428 U.S. 325, 331-32, 96 S. Ct. 3001, 3005, 49 L. Ed. 2d 974, 981 (1976) (Footnote and citation omitted).

[17]The Court also considered the Alabama sentencing authority in light of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and Bell v.

Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978), and finds no problem with the Alabama statute. The Ohio statute, much like the mandatory North Carolina and Louisiana statutes, precluded consideration by the sentencing authority of the particularized aspects of the defendants' character and record, and the particularized aspects of the crime itself. As noted in the text, supra, section 13-11-3, which requires a pre-sentence hearing, avoids this problem.

[18]This is precisely the rationale adopted by the Florida Supreme Court in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

> The aggravating circumstances of Fla. Stat. § 921.141(6) [sic], F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A. —to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

This Court notes that the aggravating circumstances set out by the Florida Statute, Fla. Stat. § 921.141(5), are with a minor exception, identical to those set out in the Alabama Statute, Ala. Code, § 13-11-6.

[19]The stipulation between the parties reflects that there have been 22 cases under the statute in which the defendant received life imprisonment without parole. Thirteen of these sentences were the result

of guilty pleas, while the other nine defendants were convicted at trial after a not guilty plea. In seven of the nine cases the state actively sought the death sentence, but in each of those cases the jury-imposed death sentence was reduced to life imprisonment without parole. Those seven cases were handled by four different trial judges.

[20]Even if the Court concluded that the Alabama process did run afoul of Lockett, it is unlikely that such a finding would be of any benefit to the petitioner. This is true because the record is clear that in the petitioner's case the trial court actually did consider a mitigating circumstance not enumerated in the statute in reaching its decision on punishment. Evans v. State, 361 So. 2d 654, 664 (Ala. Cr. App. 1977). Certainly the trial judge here was not encumbered by any Lockett-condemned considerations.

[21]In Dixon, the Florida Supreme Court defined its own function in reviewing death penalty cases:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions

and determine whether or not the punishment is too great.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

[22]In case of a conviction and imposition of life imprisonment without parole, the appeal is not automatic but rather must be pressed by the defendant. See, e.g., Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979).

[23]The Florida statute had previously been upheld in Proffitt.

APPENDIX J

TITLE 28, UNITED STATES CODE, SECTION 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by an available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or

the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing

in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant,

otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall

produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 13, 1981
CERTIORARI GRANTED JUNE 22, 1981

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EVANS v. BRITTON

COURT OF APPEALS DOCKET ENTRIES [Excerpts]

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Title omitted in printing)

(Information combined chronologically from different subheadings and subheadings omitted)

Date	*Description*
	* * *
8/2/79	Record on Appeal and Exhibits
10/11/79	Brief for Appellant
	* * *
12/20/79	Brief for Appellee
1/17/80	Reply Brief for Appellant
	* * *
3/5/80	Flg. Ltr. of pro se appellant with statement attached. (Clerk's Endorsement)
3/28/80	Supp. Authority (Appellee) (CA)
4/1/80	Case argued
7/1/80	Flg. appelles' motion to certify questions of Alabama law to the Alabama Supreme Court (Submitted 7/2/80 RSV)
7/22/80	Supp. Brief for Appellant (Sent to Judges)
7/23/80	Supp. Brief for Appellee (Sent to Judges)
9/10/80	Flg. Ltr. of appellee dtd. 9/8/80 with attachment in support of motion to certify questions of Alabama law to Ala. Supreme Court. Submitted 9/10/80 RSV

10/15/80 Opinion Rendered/RSV Reversed/P.C./Thomas Dis.

10/23/80 Rehearing Mot. for Ext. (Appellee)/Ext. to: 11/19/80 (Per REW)

11/19/80 Petition for Rehearing (M) (Sent to Judges)/Appellees/En Banc

1/29/81 Flg. Ltr. of Appellees, dtd. 1/27/81, calling to Ct.'s attn. decisions w/reference to pet. for rehearing. (Sent to Judges)

3/9/81 Order Denying Rehearing (P) p. 4393/Thomas Dissenting

3/12/81 Stay of Mandate Motion (Submitted 3/13/81 RSV)/Granted RSV (3/20/81 to 4/8/81)

3/12/81 Flg. appellees' mot for clarification of en banc petition status.

3/20/81 Flg. Order DENYING appellees' motion for clarification of en banc petition status. (RSV)

4/1/81 Further Stay of mandate motion/Submitted 4/2/81 (RSV)/Granted RSV/(4/3/81 to 4/15/81)

4/20/81 Notice of Flg. of Cert. Pet. on 4/13/81

6/25/81 Order of S.C. Granted 6/22/81

EVANS v. BRITTON

DISTRICT COURT DOCKET ENTRIES [Excerpts]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

(Title omitted in printing)

Date	*Proceedings*
4/12/79	Petition, with verification, filed; referred to Judge Hand, lps.
4/13/79	Amendments to petition for a writ of habeas corpus by a person in State custody and for stay of execution filed by petitioner; referred to Judge Hand, lps
4/13/79	ORDER entered setting this case for hearing on Thursday, May 17, 1979 at 2:30 p.m. on its merits. . . .
	* * *
4/19/79	Motion for order compelling petitioner to present all constitutional claims and issues or waive them, with exhibit and brief attached, filed by respondent, lps
4/20/79	* * *
	ORDER entered that counsel for petitioner shall have 5 days in which to amend its petition to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this situation; the request for stay of execution is GRANTED and the execution set for April 27, 1979 is STAYED, effective at 5:00 P. M., Thursday, April 26, 1979,

provided this action is not withdrawn by the petitioner prior to that time (Min. Entry No. 48967), lps

4/23/79 Copies of Min. Entry No. 48967 mailed to attorneys, lps

* * *

4/25/79 Response of petitioner filed, ob

4/25/79 Amended Petition adding additional sub-paragraphs filed, ob

* * *

5/14/79 AMENDED petition filed, lps

ANSWER to amended petition filed by respondent (exhibits to this ANSWER are in a red file folder so marked), lps

* * *

5/17/79 HEARING held, arguments of counsel made, one witness examined. . . .

6/12/79 MEMORANDUM OPINION entered, after Court trial, finding that the Alabama Death Statute as related to the instant case is not unconstitutional (Min. Entry No. 49311), lps

JUDGMENT entered, in accordance with Memorandum Opinion of this date, that the petition for writ of habeas corpus is DENIED, costs taxed against the petitioner; further ORDERED that the stay of execution entered on April 20, 1979 effective since April 26, 1979 is DISSOLVED (Min. Entry No. 49312), lps

* * *

7/02/79 NOTICE OF APPEAL filed by Petitioner, John Louis Evans, III,

* * *

7/05/79 Certificate of Probable Cause to Authorize Apeal entered by Judge W. B. Hand, mpc

7/13/79 Certificate of Merit entered, (Minute Entry No. 49, 607). Copy mailed to Attorneys and to B. J. Mahoney, Court Reporter. mpc

* * *

7/31/79 Court Reporter's transcript of Hearing on Merits of Petition for Writ of Habeas Corpus filed by Betty Jane Mahoney, Official Court Reporter. mpc

STATE v. EVANS

EVANS' STATEMENT TO THE F.B.I.
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(State's Ex. 16 in the state trial court — Habeas Answer Ex. A, 182-183, 252, 275-276.)

Little Rock, Arkansas
March 8, 1977

I, JOHN LOUIS EVANS, III, furnish the following free and voluntary signed statement to BILL P. HARDIN and JACK E. JUEL, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I understand this statement can be used in court.

At Mobile, Alabama, on January 5, 1977, WAYNE EUGENE RITTER and I entered a pawn shop with the intent to rob that pawn shop of a pistol. When we entered the pawn shop I had a .38 caliber German made revolver hidden in my waistline. WAYNE EUGENE RITTER asked the store owner to show him a .38 caliber Colt revolver. When the store owner took that revolver from a display shelf and handed it to WAYNE EUGENE RITTER, I drew my pistol at which time the store owner immediately ducked behind the counter and attempted to reach a gun in a nearby office. I leaned immediately across the counter and fired one shot which I know to have struck the man in the back. WAYNE EUGENE RITTER and I immediately ran from the store taking with us the .38 caliber Colt revolver. In the store at the time of the shooting were two young girls approximately six or seven years old. When we left the pawn shop we stayed in the Mobile area for approximately two-and-one-half hours.

I have read the above statement consisting of this and one other typewritten page. I have initialed each page and any correction. The statement is true to the best of my knowledge.

/s/John Evans

Witnesses: Jack E. Juel, Special Agent, FBI, Little Rock 3/8/77 (in handwriting)
Bill P. Hardin, Special Agent, FBI, Little Rock, Ark. 3/8/77 (in handwriting)

(Initials "J.E." omitted from each paragraph in printing.)

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

EVANS' STATE GRAND JURY TESTIMONY
[Excerpts]

(State's Ex. 27 in the state trial court — Habeas Answer Ex. A, 232-233, 318-337)

(Bracketed page references are to Habeas Answer Ex. A pages)

(Title omitted in printing.)

* * *

[321]

Q: Have a seat right here, John. All right. This is going to be sort of difficult for you to do so, but do the best you can. Would you raise your right hand? Do you solemnly swear the testimony you're about to give to this Grand Jury to be the truth, the whole truth, and nothing but the truth, so help you God?

A: Yes, I do.

Q: State your full name, please, sir.

A: John Louis Evans, III.

Q: How old are you, John?

A: Twenty-seven.

Q: And where were you born?

A: Beaumont, Texas.

* * *

Q: O.K. Uh, how did you meet Wayne Eugene Ritter?

A: Uh, we were both serving time in the Indiana Youth Center, Indiana's correctional institution.

* * *

[322]

Q: All right. Uh, had you and Ritter discussed, uh, what your plans might be while you were serving time in that institution?

A: Well, more or less. Uh, yeah, we decided we were going to get together and see what happened. You know, uh, decided that, uh, course I always knew that I'd go back

to armed robbery. You know, so, uh, he was game to try it so I was going to wait around till he got out.

Q: O.K. When you met and, uh, on Dec—was it December first or around that period of time?

A: Right.

Q: Did you have a conversation concerning what your plans may be at that time?

A: Oh, yeah, we discussed it for two or three weeks.

Q: Uh, could you summarize briefly what you had planned to do and h-- and your . . .

A: Well, you know, not really, I was going to rent a car and we were just going to take off. You know, go on a spree and, uh,

Q: You say a spree, what kind?

A: Armed robbery.

Q: Armed robbery spree.

A: And, uh, course, uh, Wayne was with his ex-wife then and wasn't quite sure and of course then they kinda fell out so he decided O.K. and we left, I think, on Christmas Day.

Q: All right. And did you—either one of you have guns at that time?

[323] A: Uh, yeah, when we left Indianapolis.

* * *

Q: Uh, approximately how many places did you go into prior to arriving in Mobile?

A: Uh, you mean as far as robbery goes? Three.

Q: And where were they located?

A: Uh, one in Dayton, Ohio; one in Montgomery, Alabama; and one in Biloxi, Mississippi.

Q: And were they—what type uh, institutions?

A: One of them was a Pizza Inn, another one was a Pizza Hut and another one was a motel.

Q: When you, uh, you didn't come straight to Mobile, Alabama, did you?

A: No, we didn't.

Q: Where did you go?

A: Well, we went down to Biloxi and we were down there for a few days.

Q: All right. Did you have companions in Biloxi?

A: Uh, yeah, we met a couple of girls there. Of course, they didn't know what was going on, I want that on the record, too.
Q: They didn't know that y'all were out pulling armed robberies?
A: No, no idea.
Q: You had, up until that time, you hadn't harmed anyone with a weapon of any sort?
A: No.
[324] Q: Uh, when you—what prompted you to come to Mobile, Alabama?
A: For robbery. Money.
Q: For money?
A: Yes.
Q: All right. And you came to Mobile on what date, do you recall?
A: January the fifth, 1977.
Q: Approximately what time did you get here?
A: Uh, about 2:30-3:00.

* * *

Q: All right. When you arrived in Mobile around 2:30 that afternoon, what were your plans, discussion, and how did you end up at Nassar's Pawn Shop?
A: Well, we were just going to wait till dark, you know, and find a place to rob. And the reason we were going to wait till dark is, you know, so that the car would not be so easily seen. And one of us was going to go in and one wait with the car. And we were riding around and talking about, you know, we could use another pistol instead of that clumsy rifle so and we passed by his pawn shop, you know, and saw it, so I said, "Well, let's go in and get one." You know, 'cause it was a little place. So I drove around the block and then we parked, you know, down the street, behind it and went in, you know, the pawn shop. And . . .
Q: Both of you go in at the same time?
A: Oh, yeah.
Q: How many people were in the pawn shop when you went in?
A: There were two girls, uh, watching TV in the corner,

uh, I don't, you know, I know now their ages, but I didn't at the time.

Q: All right. At that time, would you have considered them to be young girls?

[325] A: Oh, yeah, you know, bet--at the time, I figured between 6 and 10 years old.

Q: O.K. You later determined that they were 6 and 9, I think (inaudible).

A: Seven and nine.

Q: Seven and nine?

A: Right.

Q: Uh, was the owner there or some proprietor there or someone?

A: Yes.

Q: Was that the man that was shot?

A: Yes, it is.

Q: All right. Where was he located when you entered the store?

A: Uh, behind the counter and by--by the door and, uh, then when we came in, we walked to the counter in the back and Ritter asked to see a .38 Colt Cobra. And, uh, then Nassar reached in, and got it and handed it to Ritter and I started to pull my pistol to tell him it was a robbery and he dropped behind the counter and started for his office.

Q: Who did?

A: Nassar.

Q: Was he on his hands and knees?

A: Yes, he was.

Q: His back was to you?

A: Yes.

Q: You didn't notice a weapon at that time, did you?

A: Uh uh. No, he turned into the office and started to reach with his hand and then that's when I shot.

Q: Where did you shoot him?

A: In the back.

Q: And where was Ritter located in relation to you?

A: He was still back there by that counter.

Q: I see. You at no time saw a weapon?

A: No.

Q: It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?
A: Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.
Q: O.K. You--when you left there, were you convinced that the man probably was dead?
A: Oh, yeah.

* * *

[326] Q: You drove away?
A: Yes, I did.
Q: Where did you go then?
A: Uh, well, we kinda zigzagged around some streets and then we went to a shopping center and we were going to, you know, we decided, you know, well, hell, we couldn't try to get out of town then because people had seen the car. We were going to wail till dark and, uh, then we decided well, we might as well pull a robbery, you know, uh, when it gets dark 'cause we still needed the money. So, uh, then we, uh, had seen a Radio Shack and we decided we were going to wait till dark and go and hit it, you know, which we did. I parked the car on the side and then Ritter went in and held it up.
Q: About how much money did he get out of that?
A: About $300, I think.

* * *

Q: Getting back to, uh, Nassar's, uh, store and--and where he was shot, what do you recall, uh, Ritter, who spoke first to Nassar?
A: Uh, Ritter did.
Q: Did you ever say anything to him?
A: No.
Q: Uh, what did Ritter, what do you recall Ritter say--telling him or asking him?
A: He--we walked in and went back and we were talking about--Ritter and I were talking about the different guns back there and then he looked at Nassar and said, you know, 'Let me see that .38 Colt Cobra down there,' and . . .

Q: What? Did--did Nassar give him the gun?

[327] A: Right, he took the gun out and gave it to Ritter, you know, to look at.

Q: What did Ritter start doing with it?

A: Uh, well, Ritter had about six shells, I think, .38 shells, in his hand and, uh, the thing was as that he was going to start loading it as soon as I threw down on Nassar and I, of course, I guess he was still loading, you know, by the time I shot him.

Q: O.K. All right, you, uh, left the store, were the--were the little girls visible there when you shot Nassar in the back?

A: Well, they were in the left hand corner of the store and, of course, my back was, you know, to them so I didn't see if they moved or anything.

Q: O.K.

A: It was right I shot him when we left.

Q: All right. You left, you robbed a Radio Shack in Mobile . . .

A: Right.

Q: And what did you do then?

A: Got out of town. We went to, uh, Biloxi, Mississippi.

* * *

[328] Q: Where did you go then?

A: Jackson, Mississippi.

Q: And what did you do in Jackson?

A: Pulled an armed robbery.

Q: Where?

Q: Motel there. We were setting up an extortion type thing with a store, but the guy lived too far so we decided to hold it up and then on in to New Orleans and pull something there.

Q: Did you go in to New Orleans?

A: Oh, yeah.

Q: How many did you hit in New Orleans?

A: Uh, we held up two Pizza Huts and, uh, a chicken place and we pulled a kidnapping-extortion with a guy that ran an A & P Store, manager, and got $4,000, and of course, we left right after we did that.

Q: Uh, the Grand Jury might be interested to know how you did this extortion.

A: Well, we just found out the information, you know, on the manager and, uh, where he lived and everything and made a few phone calls and found out, you know, who he was and then, uh, one night we went to his house and knocked on his door and asked for somebody, you know, fictitious name and the lady got the phone book and she looked, 'Nobody here by that name, but I'll check for you.' And when she came back with the phone book we just pulled pistols and went on in. Then we taped up, you know, her and a friends of hers and, uh, the kids and Ritter went to the store with him. Made him empty the safe and, uh, of course, I was right behind him, which he didn't know. He thought I was still in the house with the family and, of course, nobody was hurt or anything, we just left them taped up. And, uh, then we got the money and we split--split up then.
Q: Where did you go after leaving New Orleans?
A: I went back to Biloxi and, uh, Ritter went up to Indianapolis and, uh, I think, that was on a Friday and Saturday we found out that we were wanted for murder.

* * *

[329] Q: After he got back, what did y'all do?
A: Well, we had about twenty-seven hundred dollars so, uh, we picked up the two girls that we were with earlier, and, uh, went to Florida. Orlando and, uh, you know, for Disney--took them to Disney World and everything and, uh, we were going to set up another kidnap-extortion there but, uh, we pulled a few armed robberies in the meantime.
Q: In the Orlando area?
A: Oh, yeah, yeah.
Q: Uh, after leaving Or--Orlando, where did you go?
A: To Tallahassee, Florida. We stayed there overnight and, uh,
Q: Rob a place there?
A: Robbed two places there.
Q: Two places. And then where did you go?
A: Pensacola.
Q: Did you hit anything in Pensacola?

A: Yeah. Robbed one place there and, uh, of course, like I said, we still had the girls with us, they didn't know what was going on and so . . .
Q: They didn't know you were pulling these robberies?
A: They didn't--had no idea whatsoever. They had no idea. And, uh, so we took up them home to Mississippi and, uh, took off with a car that I had this girl rent, you know, in her name, 'cause obviously I couldn't rent a car.
Q: Where did--where did you rent a car?
A: In Mississippi--Biloxi.
Q: I see. What was the girl's name?
A: Edie Fergonus. And, uh, then after we split from there, we went to Birmingham and pulled one robbery there and, uh, from there, we went to Charlotte, North Carolina, and pulled two armed robberies and a kidnap-extortion there. And, uh, from there we went to Chattanooga, Tennessee, and spent all the money and pulled two armed robberies there. Then we went to Nashville and pulled an armed robbery; then Memphis pull an armed robbery and then Little Rock we pulled two armed robberies and one attempted and set up another kidnap-extortion and the night we pulled the second armed robbery, uh, we got busted by the FBI.

* * *

[330] Q: It's my understanding from talking to you previously that you hadn't intended to be taken alive, is that right?
A: That's absolutely totally right.
Q: All right. Had you had your gun, it would have been a shoot-out and you had either escaped or you'd have been killed, it that correct?
A: Probably killed.
Q: Uh, so it was just a matter of, uh, surprise that you were apprehended without . . .
A: Right.
Q: There being a shoot-out of some sorts.
A: Right.

* * *

Q: Uh, no agent since the time you've been apprehended until this very moment has ever abused you in any way?

A: Oh, no, no, we've been treated very well, as a matter of fact.
Q: Threatened or coerced or promised or anything?
A: No.
Q: Uh, have you and Ritter discussed, uh, how this thing may come to an end or how you, uh,
A: You mean, now? Now that we're caught or?
Q: Prior to, uh, to being caught? Uh, did you ever . . .
A: Oh, oh, yeah.
Q: Did you ever think you'd be caught?
A: Oh, sure.
Q: And, uh, did you--when you, I'm sure you didn't plan to be caught, but you assumed that one day there was a chance of you being caught.
A: Oh, yeah. INAUDIBLE
Q: Upon that chance, had you made plans as to how you were going to try to get out of it or what would happen as a result of, uh, an encounter with law enforcement.
A: Uh, yeah. You know, we were going to make them take us--take us out of it and explain that we were going to get into a shoot-out, you know, because we had nothing to lose at that time, you know, uh, matter of fact, we figured we had nothing to lose from the time we left Indiana as parole violators. So, uh, of course, we've made the [331] statement that we wouldn't be taken and this is what we meant.
Q: O.K. Now, you were extradited back to, or waived extradition back . . .
A: Right.
Q: From Little Rock to Mobile, Alabama.
A: Right.
Q: You've been residing in the Mobile City Jail, have you not?
A: Right.
Q: You have given statements to the FBI, is that correct?
A: Right.
Q: And that was done after having been fully read your rights?
A: Right.
Q: Uh, no threats or coercion?

A: Right.
Q: The same being true with the statements given Mobile Police Department?
A: Right.
Q: And I guess the discussions you and I have had on various occasions, the same being true, is that right?
A: Right.
Q: You have been advised of your right by the Presiding Judge of the Circuit Court Joe Hocklander . . .
A: Right.
Q: At one time, prior to you making a television statement. Uh, no one has offered these things, you've requested it or asked for these things to be done?
A: Right.
Q: Uh, you have indicated to me, uh, on numerous occasions, I guess I could say, you wanted to die in the electric chair in the State of Alabama as soon as possible.
A: Right.
Q: Is that correct?
A: That's right.
Q: Uh, when you requested that I come over to the police station to discuss this with you, would it be a fair statement to say that I explained to you all the alternatives involved in the laws of the State?
A: Oh, yeah.
Q: Uh, did I tell you that, uh, you had a right to a trial by a jury?
A: Right.
Q: And, did I tell you that, uh, if a jury found you guilty it would be mandatory death but a judge could at the mitigating hearing, uh, commute it to life without parole?
A: Right.
[332] Q: Uh, do you still maintain, uh, that you wish to be indicted at the earliest possible moment and wish to be sentenced to death at the earl--earliest possible moment and electrocuted at the earliest possible moment?
A: Yes, I do.
Q: And, John, do you do all these things without any

promises or hopes of reward, leniency, or payments by anyone?

A: That's right.

Q: No one has threatened or coerced you to want to die, is that correct?

A: No.

Q: Uh, the only promise that anyone could make you under this set of circumstances, would be for you to go to Heaven and no one has that authority on this earth at that time.

A: That's right.

Q: You understand that? Uh, do you have any specific statements that you wish to ask or tell the Grand Jury before they might want to ask you some questions?

A: No, the only thing I ask is to be indicted and go through the whole thing as fast as possible.

Q: All right. Do any members of the Grand Jury? Yes, sir, and--and if you would, for the record, go ahead and state your name.

Q: Uh, my name is Tetea Crum, and I would like to ask him, why do you want a speedy trial?

A: Well, uh in the first place, I can't see staying in jail for, you know, for six months when--when you're going to get the same result anyway. Uh, I'm asking to be electrocuted in a, uh, a chair because I can't see spending the rest of my life locked up in a penitentiary, you know, I'm too young for that. So, uh, I feel like the best thing to do is to go ahead and get it over with as soon as possible.

* * *

[333] Q: Uh, you've been asked the question of how you view yourself. Uh, and I think you stated on occasions that you felt like you're . . .

A: Always been pretty rotten. Always been.

Q: Uh, if you had the opportunity, John, to be released, uh, what occupation would you pursue?

A: Honestly?

Q: Uh huh.

A: I'd go back to armed robbery.

* * *

Q: You've fully understood the consequences of you act when you shot Mr. Nassar?
A: Oh, yeah.
Q: Uh, you know the difference between right and wrong, John?
A: Sure. Sure, but, you know, society sets standards. Let me put it like that.

* * *

Q: And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?
[334] A: I didn't take time to think about it. Uh,
Q: After you shot him, did you know it was wrong?
A: I felt like it was wrong. Well, let me put it like this, I don't feel any remorse over it because I felt like anybody that would take a chance like that, especially with his two kids in there, you know, uh, there's got to be something wrong with the man. Uh, there's no way he could have beat me into that office ev--you know, if he had a pistol there or even if he didn't. There's, you know, it would have been utterly impossible.
Q: You were going to shoot him if he made that move?
A: I was going to shoot him if he reached for a--a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's--that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well, that's--that's pure instinct. That's self preservation. I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have--if--if it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick. And I couldn't see him doing it with his kids there and I think that's the only--the only thing I have any remorse about or regret about. You know, was that the kids saw it. They were there and, uh, I couldn't understand it, too, because if I had been somebody really crazy, really far-out, you know, and didn't want any witnes, then I would have turned around and shot his kids, too, you know. But, uh, you know, uh, I just couldn't see him doing it, you know, I felt like, you know,

well, he took the chance *(inaudible)* first.And it's just that simple.

* * *

Q: Well, why didn't you give yourself up? You had that to do . . .
A: Well.
Q: Avoid all this, what you've been through?
A: No, because . . .
Q: 'Cause then you would have been off the street.
A: No, well, you know, uh, as a matter of fact, to be honest with you, I talked to an FBI agent twice before, uh, they caught us in my home town, uh, at my mother's suggestion. And we had talked about the possibility of me giving myself up. And, uh, course, when I found out, you know, I had nothing to lose anyway, well, why? Why give yourself up? Uh, . . .
Q: What do you mean you don't have anything to lose?
A: Well, uh, you know, I figured that I would get the electric chair anyway, you know, some place. And, uh, . .
Q: That's--that's what you're going after?
A: Well, uh, yeah, you may call it fatalistic.
Q: *(Inaudible--speaking while Mr. Evans speaking)* You wasn't going to be satisfied till you *(inaudible--Mr. Evans starts speaking).*
A: You--yeah, it may be fatalistic, you know, streak, I guess, you know, but, uh, uh, I knew the--the consequences and, uh, I knew all [335] the circumstances and I did it, uh, you know, with the same mind. I knew what I was doing. So, now--now's, you know, the old saying is, you know, you hear the tune, you've got to pay fiddle.
Q: Let me ask you this. You say, you would've gotten death here or somewhere else. Have you done something somewhere else that you would have *(inaudible--Mr. Evans starts speaking)*
A: Yeah, uh, I'm going to discuss that with Mr. Phillips, but, uh, it's something that didn't happen in all this, you know, uh, but I'm sure that it would constitute.
Q: You mean you've committed other crimes that somewhere else may have, uh, . . .

A: Which the police know nothing about as of this time.
Q: And you'd rather not talk about it yet?
A: Well, not to the Grand Jury. I might talk to the police about it.
Q: Bernard Smith. Was uh, Mr. Nassar the first man you ever killed?
A: No. Absolutely not.

* * *

Q: Well, have you ever thought of just going out and getting a job, a decent job?
A: Oh, I've done that, sure.
Q: And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?
A: Well, uh, I don't know. Uh, It's kinda like an inner drive. I guess, you know, it's something that I always, uh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know.

* * *

Q: You say you'd only have to kill if you had to, in other words, if the situation presented itself, you would kill in an armed robbery as you did?

[336] A: If I had to do it again, yeah, without a doubt.
Q: Yes, sir.
Q: Charles, David Lucas. You said you was, uh, you talked to FBI agent twice?
A: Right.
Q: Before you was arrested? Is that since you killed Nassar?
A: Oh, yeah, oh, yeah.
Q: And he didn't try to arrest you?
A: Well, no, I didn't talk to his person, I talked to him over the phone. Uh, I was in Little Rock one time and Memphis the other time. And he was in Beaumont, Texas. Uh, he was a local agent there and, uh, of course, uh, matter of fact, he tried to get in touch with you and, uh,

you know, to see exactly what the deal was and he said, 'I won't lie to you.' He said, but I suggested getting together for a meet and he said, 'Well, I'm going to be honest with you, now, if I show up for a meeting, I'm go--you know, I'm not coming alone. You know, we're going to try and take you.' And he said, 'That's my job.' And I said, 'Well, I understand that, you know. I just want to know what the deal is.' Uh, I said, uh, 'If they still have the death penalty, then, you know, maybe I'll do it. If not, then forget it.' And he couldn't find out anything, couldn't guarantee me anything, you know, which I couldn't really expect him to. So we--I just decided, you know, well, I'll just wait until they find, you know, something does happen.

* * *

[337] Q: Do you have anything else you'd like to say?
A: No, that's it.
Q: Uh, you still--would you ask this Grand Jury to recommend to the Court that, uh, you be given priority and--and under the law and a trial date set as soon as--as allowable under the law so that, uh, you may either have your case tried or plead guilty?
A: Yes, I do.
Q: Do you intend to have your case tried or do you intend to plead guilty?
A: Plead guilty.
Q: Do you realize when you plead guilty you are pleading guilty to a--a death by electrocution?
A: Yes, I do.
Q: Do you intend to appeal it?
A: No, I do not.
Q: Any questions? Do you have anything else you want to say?
A: No.
Q: Again, for the record, you were not in any way threatened, coerced, promised, offered any hope of reward? You requested to have an opportunity to come here and speak to the Grand Jury?
A: Yes, I did.
Q: And you have nothing else at this time you want to, uh,

A: No, that's it.
Q: All right.
END OF TESTIMONY

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT ARRAIGNMENT PROCEEDINGS [Excerpts]

(Habeas Answer, Ex. A, 67-69)

(Bracketed page references are to Habeas Answer Ex. A pages.)

(Title omitted in printing.)

* * *

[67]

MR. COLEMAN: Judge, it is my understanding and Mr. Pennington's understanding that the Defendant is going to enter a plea of guilty to the indictment, in all three counts. I would like for the Record to state that Mr. Pennington and I have both advised the Defendant not to [68] enter a guilty plea, that he should enter a not guilty plea at least until such time as a determination has been made as to his competency. After having talked with him, it is still our understanding his desire to enter such a plea over our joint objection.

THE COURT: All right, Mr. Evans. First, what are your instructions to your attorney on whether to attack the validity of the Grand Jury that indicted you?

MR. EVANS: I'm going to waive that right, your Honor.

THE COURT: What is your response to the indictment?

MR. EVANS: It is true and correct on all counts.

THE COURT: Are you guilty or not guilty?

MR. EVANS: Guilty.

THE COURT: All right. The Court will set this for submission to a Jury at 9:30 next Tuesday, not tomorrow, but the 26th of April. Mr. Ritter was here earlier, and he indicated to me a desire to have both of you tried together. And that can only be done at your request. The law guarantees you the right to a separate trial.

MR. EVANS: We are both requesting that.

MR. COLEMAN: Judge, I would like for the Record to

show that he is doing that over my objection, too.

[69] MR. PENNINGTON: And over mine.

THE COURT: Now, your attorneys have filed a request for a mental examination, and I have spoken to Dr. Claude Brown and he will be visiting you sometime this week in jail. You do not have to talk with him if you do not want to, but if you talk with him, he will be at liberty to repeat anything you tell him.

MR. EVANS: All right.

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT MINUTE ENTRY CONCERNING ARRAIGNMENT

(Habeas Answer Ex. A., 6)

(Title omitted in printing.)

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorneys, John Coleman and Al Pennington, and the defendant in open court on this day being arraigned on the indictment in this case charging him with the offense of Capital Murder to which indictment defendant plead guilty.

And thereupon in open court on this day the defendant was served with a copy of the Indictment in this case.

And thereupon in open court on this day, the defendant and with his attorneys, and it is ordered and adjudged by the court that the trial of this case is hereby set for April 26th, 1977.

And it is further ordered and adjudged by the court that the defendant be and he is hereby allowed until the 22nd day of April, 1977, at 12 o'clock noon to file special pleas in this case.

And it is further ordered and adjudged by the court that the defendant's request to be tried together with the defendant in Cases No. CC 77 000532 and CC 77 000533, be and the same is hereby granted.

And thereupon in open court on this day the defendant waived challenge to Grand Jury over the objections of the defendant's attorneys.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

PSYCHIATRIC EXAMINATION FINDINGS

(State's Ex. 1 in state trial court — Habeas Answer Ex. A, 94-95, 251, 258)

Claude L. Brown, M.D.
176 Louiselle Street
Mobile, Alabama 36607

April 21, 1977

Judge Joseph M. Hocklander
Presiding Judge
Mobile County Circuit Court
Mobile County Courthouse
Mobile, Alabama 36602

Re: John Evans

Dear Judge Hocklander,

As you requested, I examined Mr. Evans in the Mobile City Jail on April 20, 1977. I explained to him the purpose of this examination; he already fully understood, was entirely agreeable to the interview, and talked freely about himself on all subjects.

He is of bright normal intellect, and has no history of any relevant diseases, injuries, or incapacitations. He says that he was entirely sober at the time of the crime. He consistently urges that he is responsible for his actions, and that, despite the attitudes of society, he has chosen crime as a way of life.

Mr. Evans is competent, rational, and able to stand trial. He understands thoroughly the nature and results of his actions; he knows the difference between right and wrong, and he chooses, often, the wrong.

He is sincere in seeking the death sentence, preferring extinction to a long prison sentence.

If a more detailed report is necessary, please let me know

Sincerely yours,

/s/Claude L. Brown, M.D.
CLAUDE L. BROWN, M.D.

CLB/lr

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT JURY EMPANELMENT PROCEEDINGS [Excerpts]

(Habeas Answer Ex. A, 85, 93-94)

(Bracketed page references are to Habeas Answer Ex. A pages)

[85]

THE COURT: I am not going to disqualify someone on the question of hesitation. Now, this case has received considerable pre-trial publicity. I know that most of you, or maybe some of you, have read or heard about the charges against these two defendants prior to today. The only Jurors that I can have sitting in the trial of this case are Jurors who can give me their assurance, individually, under oath, that they will not allow anything to influence their verdict in this case except the things they learn about the case in this Courtroom. You have to give me your assurance, under oath, that if you have read or heard anything about the case, you are capable of putting that out of your mind, and reaching a verdict on the evidence presented in this Courtroom. Does every Juror understand the question? Is there any Juror who doesn't understand clearly what I have said to you? I am now going to identify the Jury. Mrs. Trott will call your names. When your name is called, I want you to stand long enough for the attorneys to see who you are, than I want you to say, to me, "You have my assurance." Is that clear? Proceed.

* * *

[93]

THE COURT: Let the Record show that at the time the Court concluded asking its qualifying questions of the Jury, the Court requested that the attorneys contact the Defendant to see if [94] they had any additional questions, and Mr. Ritter indicated that he is satisfied. Is that correct?

MR. RITTER: That is correct, sir.

THE COURT: Mr. Pennington?

MR. PENNINGTON: Yes, sir?

THE COURT: Mr. Evans wanted some additional question asked, and I think I covered it, and Mr. Ritter and Mr. Evans are both satisfied with the Jury, is that correct?

MR. EVANS: Yes, sir.

MR. RITTER: Yes, sir.

MR. COLEMAN: Judge, may we put in the Record what the question was?

THE COURT: Mr. Evans wanted to be sure that no one had any hesitancy about returning a verdict of death by electrocution.

MR. COLEMAN: Yes, sir.

MR. EVANS: That's correct.

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BEGINNING OF TRIAL [Excerpts]

(Habeas Answer Ex. A, 96-97)

(Bracketed page references are to Habeas Answer Ex. A pages)

(Title omitted in printing.)

* * *

[96]

MR. STEPHENS: Your Honor, for my client, I would like to ask for the Rule before we get started, if it hasn't already been requested.

MR. PENNINGTON: Mine, also.

MR. GRADDICK: And I would like to exclude Detective Bowman from the Rule.

THE COURT: All right. We will excuse Detective Bowman from the Rule, and any other witness may not be allowed to testify if he is in the Courtroom.

(Whereupon, the Rule having been invoked, all witnesses to the cause were instructed to remain outside of the Courtroom during all proceedings, except when called to testify.)

THE COURT: Proceed.

(Whereupon, an Opening Statement to the Jury was presented by Mr. Graddick, and there were no objections made thereto.)

(Whereupon, an Opening Statement to the Jury was presented by Mr. [97] Pennington, and there were no objections made thereto.)

(Whereupon, an Opening Statement to the Jury was presented by Mr. Coleman, and there were no objections made thereto.)

(Whereupon, Opening Statement was waived by Mr. Stephens.)

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(State's Ex. 22 in state trial court — Habeas Answer Ex. A, 207, 252, 285-286)

(Title omitted in printing.)

MOTION TO ENTER GUILTY PLEA

Comes now the Defendant in the above styled cause and represents unto the Court as follows:

1. My true name is John L. Evans and I am 27 years of age.

2. I completed the 12th grade in school and I can read and write.

3. I am represented by my attorney, Al Pennington & John Coleman, and he has discussed my case at length with me. I have had enough time to talk to him and I have discussed with him the facts in my case and I have discussed my Constitutional rights with him. I am satisfied with the services of my said attorney and I have no complaints as to the way he has handled my case.

4. I understand that the Indictment in this case charges me with the crime of Capital Murder (Act 213 Regular Session 1975 Alabama Legis) and my lawyer has explained to me the elements of this crime and the punishment therefor and I understand them.

5. I understand that the law applicable to such a charge provides that the punishment for that offense is imprisonment in the state penitentiary for not less than Death by Electrocution nor more than N/A. I wish to enter a Plea of Guilty to the offense of Capital Murder (Act 213 Regular Session 1975 Alabama Legis).

6. I understand that as to each offense charged against me in the indictment in this case I have a right to answer or plead (a) I am not guilty, (b) I am not guilty by reason of insanity, or (c) I am guilty as charged.

7. I further understand, and my lawyer has explained to me, that if I enter a plea of Not Guilty or Not Guilty by reason of insanity, to the charges, I have the following

constitutional rights:

(a) The right to be tried by a jury selected according to Law.

(b) The right to face all witnesses or accusers who testify against me and have them cross-examined by my attorney while they testify under oath.

(c) The right to have witnesses subpoenaed to give evidence in my favor and to testify myself or remain silent at my own choosing.

(d) The right to require the State of Alabama to prove my guilt beyond a reasonable doubt before I can be adjudged guilty.

(e) That I am presumed innocent of the offense charged until the State proves my guilt beyond a reasonable doubt.

(f) The right to challenge the composition of the Grand Jury which indicted me or the venire from which a petit jury will be selected to try me.

(g) The right to appeal a conviction.

(h) The right after conviction to ask for a pre-sentence investigation, a suspended sentence or the benefits of probation.

8. I further understand that if I advise the Court that I am Guilty and enter a Plea of Guilty, that I am surrendering all of the above rights (a) through (f).

9. I further understand that if I plead Guilty that the Court can sentence me to the same punishment as if I had been convicted by a Jury and further, that the Court may not give me probation even though I ask for it.

10. No one has threatened me or promised me any reward or inducement nor any hurt or harm to me or to anyone I am interested in to get me to plead guilty.

11. I wish to enter my Plea of Guilty because I am guilty and I believe it is in my best interest to enter such a plea.

12. I further understand that any agreement or recommendations that have been or may be made by the State of Alabama through the District Attorney do not bind the Court and may not be followed in imposing sentence or granting probation.

I now request that the Court allow me to enter a Plea of Guilty to the offense of Capital Murder Act 213 Regular Session of Alabama Legislature 1975 in this case.

/s/John L. Evans, III
(Defendant)

I have assisted my client in the completion of the foregoing and have satisfied myself that the Plea he wishes to enter is ~~in his best interest and therefore recommend it to him and voluntarily to the Court based on my professional judgment~~ voluntary and with full understanding of the consequences. Based on my professional judgment this was done knowingly after being advised fully of his rights. This is done over advice of counsel.

/s/Al Pennington
(Attorney for the Defendant)

(Initials "J.E." by each paragraph omitted in printing.)

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

EVANS' STATE TRIAL COURT TESTIMONY

(Habeas Answer Ex. A, 206-216)

(Bracketed page references are to Habeas Answer Ex. A pages)

[206]

(Whereupon, the Jury having been removed from the Courtroom, the following proceedings were had and done, in due form of law, outside the presence of the Jury:)

THE COURT: All right. We're not in recess, now. The State has rested, and Mr. Evans, for the last time, and Mr. Ritter, for the last time, your attorneys inform me that you wish to plead guilty to this offense and that you [207] wish to take the stand and testify. This is your decision. No one can tell you to do so. Do you have a written Guilty Plea in each case?

MR. STEPHENS: Judge, we would request again, before they take the stand, that all Constitutional rights be read to them, that they be fully aware of what they are doing. This is strictly against my advice and counsel, but they want to do it.

(Whereupon, State's Exhibit Number 21, being a Request to Enter Guilty Plea form, signed by Wayne E. Ritter, March 26, 1977, and State's Exhibit Number 22, being a request to Enter Guilty Plea form, signed by John L. Evans, March 26, 1977, were marked into evidence by the Reporter.)

* * *

[208]

THE COURT: All right, sir. Mr. Evans. Now, I have been handed a similar instrument marked

State's Exhibit 22, which appears to have been signed and initialed by you.

MR. EVANS: Yes, sir.

THE COURT: Did you sign it?

MR. EVANS: Yes, I did.

THE COURT: Did you place your initials by each paragraph?

MR. EVANS: Yes, I did.

THE COURT: Did you do so to represent that you have read and do understand each item in each paragraph?

MR. EVANS: Yes, sir.

THE COURT: Again I ask, did you read it or did Mr. Pennington read it or Mr. Coleman read it with you?

MR. EVANS: Yes.

THE COURT: Did either of them go over it with [209] you?

MR. EVANS: Yes, they have.

THE COURT: All right.

MR. PENNINGTON: I wanted to move to exclude the State's evidence, your Honor, on the basis that they haven't proved a prima facia case.

THE COURT: All right. I will deny your motion.

MR. COLEMAN: Judge, while we have the Jury out, it's my understanding on Mr. Evans, last I heard was he still intends on taking the stand. For the Record, I would like to point out to the Court that I have advised the Defendant against taking such a course of conduct in taking the stand. I have advised him of the consequences of his taking the stand, including that any deficiencies in the predicate being laid for the proper admission of the confession would be waived by his taking the stand, and admitting in Court his participation in this crime. He advises me that he wishes to do so, anyway, against my advice and consent.

THE COURT: It is his decision.

MR. COLEMAN: Yes, sir.

MR. PENNINGTON: I have made the same representation on more than one occasion.

* * *

[210]

MR. PENNINGTON: Your Honor, the Defendant has indicated that he wishes to take the stand. If he still does at this time, we would call him.

JOHN LOUIS EVANS, III

The Defendant, called on behalf of himself, having been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

MR. COLEMAN: Note my objections for the Record.

MR. PENNINGTON: Also note mine.

[211] MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I can think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say.

THE COURT: Any questions from the District Attorney?

CROSS EXAMINATION

BY MR. GRADDICK:

Q: Mr. Evans, has anybody ever threatened, coerced or forced you into this?

A: No, they have not. In any way.

[212] Q: Certainly, no one's offered you any hope of reward or leniency, have they?

A: Obviously not.

Q: When you came to Mobile, Alabama, you came here with the intent of robbing some place?
A: Yes, I did.
Q: Did you have a weapon on you?
A: Yes, I did.
Q: You were travelling with Mr. Ritter, here?
A: Yes, I was.
Q: Were you in a 1967 (sic) light blue Cutlass Supreme Oldsmobile?
A: No. A brand new one.
Q: Brand new?
A: Brand new.
Q: Rented in Indianapolis?
A: In Indianapolis. We ended up stealing the car.
Q: Stealing it?
A: Yes, I did.
Q: And, had a white license tag with blue numerals? Did it?
A: Well, more or less, yes.
Q: And, you came from Biloxi over here, right?
A: Yes, I did.
Q: How long did you drive around looking for a place to rob?
A: About --. A few hours. We wanted to wait pretty well until it was dark, and then we decided, well, while we were riding around that we were going to find a gun shop and get a pistol because we had a semi-automatic [213].22 rifle that we wanted to get rid of. It was just too cumbersome, too bulky to try and go pull armed robberies with. It was not very effective.
Q: You consider yourself a pro, do you not?
A: Yes, I do. During our spree, and this is something I don't know if you've been informed of or not, and I'm sure that Mr. Graddick ought to know, I don't know if he's allowed to bring it up or not, but, just in a two month period we were involved in about thirty armed robberies, and two extortions, and about nine kidnappings, so that gives you an idea, you know --.
Q: So this wasn't your first time, was it?
A: No, sir. Not by a long shot.

Q: How many had you committed prior to coming to Mobile, Alabama?
A: I --. Since leaving Indianapolis, or before?
Q: Before Indianapolis. You can tell me before, if you like.
A: About 250.
Q: 250 armed robberies?
A: Yes.
Q: Prior to Indianapolis?
A: Well, up until the time we got here. That's a pretty tight guess.
Q: I see. All of them with a weapon?
A: Oh, yes.
Q: Ever harmed anybody?
A: Yes.
Q: Was all of this with your side-kick, here, Mr. Ritter?
[214] A: Oh, no. No. We just started in Indianapolis Christmas Day, I think it was as a matter of fact, the day we left.
Q: And, how many did you hit --? How many places did you rob prior to getting to Mobile?
A: Three.
Q: Three?
A: Four.
Q: Four?
A: Yes.
Q: And, you got here and you decided you needed a gun, is that right?
A: That's right.
Q: You found a pawn shop out there and you rode around the corner like that little boy and little girl testified?
A: They testified right on the money.
Q: Right on the money?
A: That's right.
Q: And that lady who said that she identified y'all, she was on the money, too, is that right?
A: That's about right.
Q: Who went in first?
A: Well, when we got to the Pawn Shop, I think Wayne went in first, and I was right behind him.
Q: Mr. Evans, you weren't intending on leaving there

dead, were you?
A: No, sir, was not.
Q: If you had to take somebody's life, you would have done it, wouldn't you?
[215] A: Yes, sir.
Q: And if you get out of, walk out of here today, or any time in the future, and you go back to robbery, which you say you would, you would do the same thing, wouldn't you?
A: If I ever felt in peril, if it ever came down to a situation where it's going to be me or somebody else, I'm going to make damn sure it's not me.
Q: You made "damn sure" it wasn't you on that occasion, didn't you?
A: Yes, sir, I did.
Q: You shot him right in the back, is that right?
A: Yes, I did.
Q: You knew he was dead when you walked out of there, didn't you?
A: Oh, yes.

MR. GRADDICK: I don't have any other questions.
MR. COLEMAN: Judge, may I ask a question or two?

EXAMINATION

BY MR. COLEMAN:
Q: Mr. Evans, you took the stand against my hourly advice. did you not?
A: Yes, I did.
Q: And you are testifying now, against the advice of counsel, are you not?
A: Yes, I am.
Q: And you entered the guilty plea, and signed the waiver and plead guilty against our advice, did you not?
A: Yes, I did.
[216] Q: And during the entire period when we have been representing you, you have affirmatively instructed us not to do anything in your defense, is that correct?
That is correct.
MR. COLEMAN: Thank you.

THE COURT: Anyone else?

RECROSS EXAMINATION

BY MR. GRADDICK:

Q: You don't have any remorse from shooting Mr. Nassar, do you?

A: Not at all.

MR. PENNINGTON: Judge, may I ask him just one question?

EXAMINATION

BY MR. PENNINGTON:

Q: Mr. Evans, do you have a judgment as to how many times myself or Mr. Coleman has instructed you not to follow the course you followed?

A: Twenty or thirty times.

MR. PENNINGTON: No more questions.

(Witness excused from stand.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(Habeas Answer Ex. A, 222-226)

(Bracketed page references are to Habeas Answer Ex. A pages)

[222]
MR. PENNINGTON: We rest, your Honor.

(Whereupon, a Closing Statement to the Jury was presented by Mr. Graddick, and there were no objections made thereto.)

(Whereupon, a Closing Statement to the Jury was presented by Mr. Pennington, and there were no objections made thereto.)

(Whereupon, Closting Statement to the Jury was waived by Mr. Coleman.)

(Whereupon, a Closing Statement to the Jury was presented by Mr. Stephens, and there were no objections made thereto.)

COURT'S ORAL CHARGE TO THE JURY

THE COURT: The rules of law that I discuss with you are rules of logic and common sense. If anything I tell you doesn't sound fair and reasonable and like good common sense, raise your hand and let me go into it further. Otherwise, I will assume you understand it and you agree with me that it is good common sense, because that's what law is all about. The first thing you must understand is that nothing I say or do throughout the trial is designed to suggest what I believe your verdict [223] should be. I am forbidden by law from expressing any opinion on the evidence. The Court has no opinion on the evidence; the

Court expresses no opinion on the facts. I can only tell you that in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further. You must reach a verdict that is supported by all of the creditable evidence that has been presented to you in this case. The charge against the Defendants is that they did unlawfully, intentionally, and with malice aforethought, kill Edward Nassar during the course of a robbery. The law of Alabama provides that anyone who, during the course of a robbery, intentionally kills the victim, is guilty of this offense, and the punishment for this offense is death by electrocution. You will have the indictment with you. It contains three counts. It simply explains in three different ways the charge against the Defendants. Now, the State must prove that they intentionally killed Mr. Nassar. Unless there is an actual or positive intent to kill, they are not guilty of the crime with which they are charged. The intentional killing is a willful killing, an act governed by the will of the individual committing the same. The indictment further [224] charges that they committed the act with malice. Malice means hatred or hostility toward another. It doesn't necessarily mean a personal ill will. When associated with Murder, or a killing of this kind, it means an unlawful act, willfully done, without just cause or legal excuse. It is that mental state or condition which prompts one to do an unlawful act without legal justification. It has also been defined as that condition of mind which shows a heart, regardless of social duty, fatally bent on mischief. There are only two possible verdicts that you can return. Each verdict must be a unanimous verdict. It must be each Juror's personal verdict. Each Juror must be prepared to say, if asked, this is my personal verdict. If you find the Defendant guilty, as he is charged, in each case, you will have to write a verdict on the back of the indictment. If you find him guilty, the form is: "We, the Jury, find the Defendant guilty as charged in the indictment, and fix his punishment at death by electrocution." If you find him not guilty, the form is: "We, the Jury, find him not guilty." A Defendant in Alabama is presumed to be innocent, and this

presumption of innocence attends him as a matter of evidence until the State has, by the evidence, proven him guilty beyond all [225] reasonable doubt. That is the burden that is on the State of Alabama. They must prove the Defendant guilty beyond all reasonable doubt. I did not say beyond every doubt, or beyond all possible doubt. I said beyond all reasonable doubt. A reasonable doubt is an actual and substantial doubt, as distinguished from a mere fanciful or imaginary doubt. It is a doubt for which some reason exists, and this reason can be found either in the evidence, or in the absence of evidence. Until and unless the State proves the Defendant guilty beyond a reasonable doubt, you cannot convict him. Does any member of the Jury have a question? Anything that I have overlooked from the State?

(Whereupon, there was a brief conference at the Bench.)

THE COURT: I will further charge you with regard to the law of accomplices, or of an accomplice. The law is that anyone who aids or abets in the commission of an offense must be indicted, tried, and punished as if he were the principal.

MR. GRADDICK: No other exceptions.

THE COURT: Anything that I have overlooked for the Defendant, Mr. Pennington? Mr. Coleman?

MR. PENNINGTON: No, sir, your Honor.

MR. COLEMAN: No, Sir.

THE COURT: Mr. Stephens?

[226] MR. STEPHENS: No, sir, Judge.

THE COURT: Lady and gentlemen, you may now retire.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT MINUTE ENTRY CONCERNING CONVICTION

(Habeas Answer Ex. A, 29)

(Title omitted in printing.)

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorneys, John Coleman and Al Pennington, and the defendant having heretofore on the 18th day of April, 1977, been arraigned on the Indictment in this case charging him with the offense of Capital Murder and plead guilty, and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, defendant's attorneys and defendant came a jury of good and lawful men and women to-wit: Bobby Allen Lavinsky, Davis Allen Arthur, Lawrence Evans Watson, James Walter Trammell, Harry Daniel Fowler, Winfred Earl Corn, Sr., Betty Tanner Brunson, Thomas James Bryant, Thomas Earl Burdette, William A. Hamilton, Jr., Garland Cecil Hamilton and James T. McClinton, who being duly empaneled and sworn according to law, who having heard the evidence and the charge of the Court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's attorneys and defendant do say, "We, the Jury, find the defendant guilty as charged in the indictment and fix his punishment at death by electrocution."

And it is ordered and adjudged by the Court that this case be and the same is hereby re-set for sentence on the 27th day of April, 1977, at 9:30 A.M.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT
SENTENCE HEARING [Excerpts]

(Habeas Answer Ex. A, 235-236)

(Bracketed page references are to Habeas Answer Ex. A pages)

[235]

THE COURT: Does the Defendant, Mr. Evans, care to offer evidence in litigation?

MR. COLEMAN: Judge, I would like to point at those earlier records and make sure that there's no question about it inasmuch as there is an automatic appeal that we have not waived the issue of the constitutionality of the statute under which we are proceeding.

THE COURT: Alright.

* * *

[236]

THE COURT: Mr. Evans, have you been satisfied with the representation you received in the case?

MR. EVANS: Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 1-6]

(Title omitted in printing.)

(Stamp indicating filing date of April 12, 1979, omitted in printing.)

PETITION FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
AND FOR STAY OF EXECUTION

[Excerpts]

To a District Judge of the United States District Court for the Southern District of Alabama:

* * *

4. The nature of the offense involved is that petitioner was charged with capital murder in violation of § 13-11-2(a)(2), Code of Alabama (1975) in that he allegedly killed Edward A. Nassar with malice aforethought in the course of a robbery.

5. Petitioner's plea at arraignment was guilty, a plea not accepted by the court.

6. Trial of the issue of guilt or innocence was before a jury. The jury mandatorily imposed a death sentence on him. Subsequent to the jury verdict, the trial court held a hearing to determine whether or not the jury verdict should stand. After conducting the hearing, the trial judge declined to commute the death sentence.

7. Petitioner testified at trial, admitted guilt and asked that he be executed.

8. Petitioner's conviction and death sentence were appealed without his consent under the provisions of the Alabama Automatic Appeal Statute, § 12-22-24, Code of Alabama (1975).

* * *

12. Petitioner's conviction and sentence were obtained in violation of his rights as guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States for each of the reasons set forth more fully below.

(a) Petitioner was indicted, tried, convicted and sentenced under the provisions of § 13-11-1 et seq., Code of Alabama (1975), the Alabama death penalty statute. The Alabama death penalty statute is a post-*Furman v. Georgia*, 408 U.S. 238 (1972), pre-*Gregg v. Georgia*, 428 U.S. 153 (1976) law which has the following features:

(1) Lesser included offenses, although supported by the evidence, cannot be submitted to the jury in a capital prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether.

(2) The jury is required automatically to "fix the punishment at death" whenever it convicts the defendant of the capital crime charged.

(3) The defendant's only outlet from this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict hearing and "after weighing the aggravating and mitigating circumstances" as well as "the fixing of the punishment at death by the jury."

(4) The jury has no voice in the process of determining the propriety of the death sentence upon the facts of the particular case, other than to fix the mandatory death

sentence which the judge must reduce in order to spare the defendant's life.

(5) In deciding whether to reduce or to accept the mandatory jury-fixed sentence, the judge may consider in mitigation of that sentence only seven statutorily enumerated "mitigating circumstances," and may not give independent consideration to other mitigating evidence.

The net result of the features enumerated above is a capital punishment sentencing scheme which is inherently unreliable. Sentencing under that scheme has violated the petitioner's eighth and fourteenth amendment rights.

(b) In cases tried under the Alabama death penalty statute, trial juries are prohibited from considering evidentially supported lesser included offenses. That prohibition violates the defendant's right to due process of law as guaranteed by the fourteenth amendment.

(c) Petitioner was charged by indictment with unlawfully, intentionally and with malice aforethought killing Edward Nassar while "engaged in the commission or an attempt to commit a robbery." (R.20.) The indictment clearly charges the capital offense of robbery-murder. At trial, however, the judge failed to charge on the elements of robbery. (R. 223-225.) The trial judge's failure to instruct the jury on the elements of robbery deprived petitioner of due process of law as guaranteed by the fourteenth amendment.

13. The constitutional claims set forth in paragraph 12 above have been previously presented to the Alabama courts and been rejected.

* * *

Wherefore, Petitioner prays that this Court:

1. Issue a writ of habeas corpus to have him brought before it to the end that he may be discharged from his

unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Stay petitioner's execution pending final disposition of this petition; and

3. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/Dennis N. Balske
DENNIS N. BALSKE
STEPHEN J. ELLMANN
MORRIS S. DEES
JOHN L. CARROLL
1001 South Hull Street
Montgomery, AL 36104

ATTORNEYS FOR
PETITIONER

(Verification and certificate of service omitted in printing.)

IN THE
UNITED STATES DISTRICT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 16-39]

(Title omitted in printing.)

(Stamp indicating filing date of April 19, 1979 omitted in printing.)

MOTION FOR ORDER COMPELLING PETITIONER TO PRESENT ALL CONSTITUTIONAL CLAIMS AND ISSUES OR WAIVE THEM

Respondents move the Court to enter an order placing petitioner and his attorneys on notice that any claims and issues not raised before submission of the present petition to the Court will be deemed waived and will be barred from consideration in any future proceeding. As grounds for this motion, respondents show the following:

1. Any and all possible federal constitutional issues and claims concerning petitioner's conviction and sentence should be presented in the present proceeding so that the entire matter can be determined in an efficient and expeditious manner.

2. Unless petitioner and his attorneys are put on notice that any issue or claim not raised in the present proceeding will be deemed waived and will be barred from consideration at any later time, petitioner and his attorneys may attempt to reserve some claims or issues for presentation in a future proceeding. Such fragmentary and piecemeal presentation of issues and claims could be used as a device to seek or ensure further delay of petitioner's execution, if and when all the issues and claims presently raised in the pending petition are decided against petitioner.

3. Two of the four attorneys presently representing peti-

tioner recently raised in a proceeding in which they were representing another death row inmate some federal constitutional claims and issues which they did not raise in the petition filed in the present case. That other proceeding was a petition for writ of error coram nobis filed in the Circuit Court of Blount County, Alabama, in a case styled *Jerry Wayne Jacobs v. State of Alabama*. The petition filed in that case is contained on pages 2-13 of the copy of the appellate record in that case which is attached to this motion as Exhibit A.

4. Respondents do not admit or mean to to imply that there are any additional claims or issues which are in any way bona fide or even open to credible argument. It is respondents' position that the additional issues and claims raised in the petition which is part of Exhibit A are groundless and even frivolous. Those additional issues raised in the petition which is part of Exhibit A are referred to in this motion solely to illustrate that petitioner and his attorneys may be seeking to reserve some issues, which they believe to be non-frivolous, for use as a basis for future proceedings and further delay.

5. Respondents do not admit that any of the allegations, including the factual allegations, contained in the petition which is part of Exhibit A are true.

6. An order placing petitioner and his attorneys on formal notice that the marshalling of claims and issues for fragmentary and piecemeal presentation will not be allowed by the Court will prevent any misunderstanding on this point.

Therefore, respondents respectfully ask this Court to enter an order placing petitioner and his attorneys on notice that any and all federal constitutional claims and issues must be raised in the present proceeding or they will be barred from presentation in the future.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY
GENERAL
BY-

/s/Ed Carnes
ED CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

(Address of counsel and certificate of service omitted in printing.)

(Exhibit A to this motion, which is contained on pp. 20-39 of the record on appeal, omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

[R. 44-49]

(Title omitted in printing.)

ORDER

[Excerpts]

* * *

. . . this Court hereby directs that counsel for the petitioner has five days from date of this order in which to amend its petition to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this factual situation that is within the law on which to attack the constitutionality of the Alabama death statute or the incarceration of John Louis Evans, III. If counsel for Evans declines to follow the orders and directions of this Court in this regard then, by such declination, they will thereby be presumed to have deliberately waived the rights to any such proceedings on any such actions in the future. This Court and the judicial processes will not be so used to thwart the will of the people, but the doors of this Court are now open to Mr. Evans to do whatever he can through the agencies of his selected counsel whom this Court finds fully competent in these particulars to exhaust his remedies on the constitutional questions and any other questions that have viable merit under the law.

With respect to the stay of execution requested by the petitioner, the Court is of the opinion that such a stay is due to be GRANTED so that the petitioner can fully litigate his rights. Accordingly, the execution presently set for April 27, 1979 is STAYED, with such stay being effective at 5:00 p.m. on Thursday, April 26, 1979, PROVIDED that this action is not withdrawn by the petitioner by appropriate

pleading prior to this time, in which event this stay would be void and of no effect.

DONE this 20th day of April, 1979.

/s/W. B. Hand
UNITED STATES
DISTRICT JUDGE

U. S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE
20th DAY OF APRIL, 1979
MINUTE ENTRY NO. 48,967
WILLIAM J. O'CONNOR, CLERK
BY: /s/G. Walter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

[R. 52-53]

(Title omitted in printing.)

(Stamp indicating filing date of April 25, 1979, omitted in printing.)

AMENDED PETITION

[Excerpts]

Comes now the petitioner in the above-styled cause and amends his petition.

* * *

2. By adding the following subparagraph to paragraph 12

(d) In cases tried under the Alabama death penalty law, juries are prohibited from considering evidentially supported lesser included offenses. That prohibition violates petitioner's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the constitution of the United States.

* * *

Respectfully submitted,

/s/John L. Carroll
JOHN L. CARROLL
DENNIS N. BALSKE
MORRIS S. DEES
STEPHEN J. ELLMANN
1001 South Hull Street
Montgomery, AL 36104

ATTORNEYS FOR
PETITIONER

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 58-66]

(Title omitted in printing.)

(Stamp indicating filing date of May 14, 1979, omitted in printing.)

ANSWER

[Excerpts]

In response to the amended petition filed in this case, respondents answer as follows:

* * *

Proceedings in the State Courts

3. At each stage of the proceedings which led to petitioner's conviction and sentence, he voluntarily confessed his guilt after having been fully advised of his rights. Petitioner voluntarily confessed his guilt to investigators (Ex. A, 170-174, 275-278), to the grand jury (Ex. A, 318-337), at arraignment (Ex. A, 68), and at trial (Ex. A, 210-216).

4. On April 8, 1977, the Mobile County Grand Jury indicted petitioner for the capital offense of violating *Code of Alabama 1975*, §13-11-2(a)(2), by murdering Edward A. Nassar during the course of robbing him. (Ex. A, 1)

5. On April 18, 1977, petitioner was arraigned and pleaded guilty. (Ex. A, 6, 62-71) This plea was voluntarily entered by petitioner after he had been fully advised pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969), of all of his constitutional rights. (Ex. A, 48-54)

6. The trial court did not enter judgment at arraignment

based upon petitioner's guilty plea. Instead, petitioner was tried before a jury on April 26, 1977, and the State of Alabama proved beyond a reasonable doubt all of the elements of the capital offense with which petitioner was charged. (Ex. A, 72-228)

7. During the trial of petitioner in Mobile County Circuit Court, on April 26, 1977, after the State of Alabama had presented its case against petitioner, petitioner voluntarily submitted to the trial court a written instrument in which he asked to be allowed to plead guilty. (Ex. A, 206-216, 285-286) This instrument acknowledged and waived all of his constitutional rights not to plead guilty. (Ex. A, 285-286)

8. Immediately after the events described in the preceding paragraph, against the advice of his attorneys petitioner voluntarily testified as a witness against himself. (Ex. A, 206-216) During his testimony, petitioner admitted his guilt, and he asked to be convicted, sentenced to death, and electrocuted. (Ex. A, 210-216)

9. Petitioner was convicted by a Mobile County Circuit Court jury in Mobile, Alabama, on April 26, 1977 for the capital offense of violating *Code of Alabama 1975*, §13-11-2(a)(2), by murdering Edward A. Nassar during the course of robbing him. (Ex. A, 1, 29, 227)

10. While the verdict form with which the jury convicted petitioner "fixed" his punishment at death pursuant to *Code of Alabama 1975*, §13-11-2(a) (Ex. A, 227), the jury did not determine petitioner's sentence. Petitioner's sentence was determined pursuant to *Code of Alabama 1975*, §13-11-3 and §13-11-4 by the trial court judge.

11. On April 27, 1977, the Mobile County Circuit Court, per the Honorable Joseph M. Hocklander, Circuit Judge, conducted a sentence hearing pursuant to *Code of Alabama 1975*, §13-11-3.

12. Following the sentence hearing referred to in the

preceding paragraph, the Court entered specific findings of fact concerning the aggravating and mitigating circumstances in petitioner's case. (Ex. A, 238-241)

13. In the sentence hearing and determination, the Court found to exist and considered certain aggravating circumstances which are listed in *Code of Alabama 1975*, §13-11-6. (Ex. A, 238-240) The Court found that none of the mitigating circumstances which are listed in *Code of Alabama 1975*, §13-11-7 existed in petitioner's case. (Ex. A, 240-241) During the sentence hearing and determination of the Court did find and consider a non-statutory mitigating circumstance, one which is not listed in *Code of Alabama 1975*, §13-11-7. (Ex. A, 241)

14. After considering and weighing all of the aggravating and mitigating circumstances which it found to exist, the Court determined that petitioner's sentence should be death and it pronounced that sentence upon petitioner. (Ex. A, 241-243)

* * *

Exhaustion of State Remedies

16. Petitioner has exhausted all of his state remedies concerning any and all the claims, issues, and arguments which he has presented or which he can present concerning the validity of his conviction and sentence and concerning the constitutionality of the Alabama Death Penalty Statute.

17. The claims presented in paragraphs 12(a)(1) through 12(a)(7) and in paragraphs 12(b) and 12(c) of the amended petition have been presented to the Alabama courts by petitioner and they have been rejected.

18. The claims presented in paragraphs 12(a)(8) and 12(a)(9) and in paragraph 12(d) of the amended petition

have not been presented by petitioner to the Alabama courts. However, petitioner has no direct appeals remaining in the Alabama courts and well-established Alabama law concerning collateral review of convictions and sentences bars any consideration of these issues if presented by petitioner to Alabama courts. Any attempt by petitioner to present these issues to Alabama courts would be utterly futile and would merely cause further delay.

19. Petitioner has no more direct appeals available in the Alabama courts and well established Alabama law concerning collateral review of convictions and sentences bars further consideration by the Alabama court of any claims or issues whatsoever by appellant. Any attempt by petitioner to present any claims or issues whatsoever to the Alabama courts would be utterly futile and would merely cause further delay.

20. Respondents and the State of Alabama hereby expressly waive any defense based upon exhaustion of state remedies which respondents might even arguably be entitled to assert.

Response to Petitioner's Claims

21. In the trial of an indictment under Alabama's capital punishment statute, *Code of Alabama 1975*, §13-11-1 through §13-11-9, a jury has three alternatives. The jury can convict the defendant of the capital offense charged in the indictment, the jury can acquit the defendant of the capital offense charged in the indictment, or the jury can fail to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death in which case a mistrial results.

22. If a jury in a capital case does not feel that a sentence of death is proper in that case, the jury can acquit the defendant or it can refuse to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. If the jury

fails to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death a mistrial results. Pursuant to *Code of Alabama 1975*, §13-11-2(c), after a mistrial the defendant can be reindicted and tried for a non-capital offense.

23. While the verdict form with which the jury convicts any defendant of a capital offense must pursuant to *Code of Alabama 1975*, §13-11-2(a) "fix" the punishment at death, the jury does not determine or set the sentence of a defendant convicted of a capital offense under the statute.

24. Pursuant to *Code of Alabama 1975*, §13-11-3 and §13-11-4, the trial court judge and not the jury determines whether a convicted defendant in a capital case will receive a death sentence or a sentence of life without parole.

25. The trial court's determination of the sentence in a capital case is in no way restricted by the requirement that a jury which convicts a defendant in a capital case must return a verdict form fixing the punishment of that defendant at death.

26. Pursuant to *Code of Alabama 1975*, §13-11-3, the trial court's determination of the sentence of a defendant convicted of a capital offense is made only after a sentence hearing is held in which the court considers aggravating and mitigating circumstances.

27. In deciding whether to sentence a defendant convicted of a capital offense to death or to life without parole, a trial court judge is not restricted to consideration of only those mitigating circumstances which are listed in *Code of Alabama 1975*, §13-11-7. A trial court judge may consider non-statutory mitigating circumstances. As was stated in paragraph number 13 of this Answer above, the trial court judge who sentenced petitioner specifically listed in the sentence findings and considered in determining the sentence a non-statutory mitigating circumstance.

28. Alabama's appellate review of death sentences is not inadequate. The Alabama Death Penalty Statute, as interpreted by Alabama appellate courts, does provide for comparative appellate review of death sentences. Either the Alabama Court of Criminal Appeals or the Alabama Supreme Court may reduce a sentence of death to a sentence of life without parole.

29. The sentencing procedure used in capital cases in Alabama is not arbitrary and capricious as applied and administered.

30. Alabama's Death Penalty Statute, §13-11-1 through §13-11-9, is not a mandatory death penalty statute. The trial court judge who determines the sentence may set the sentence of a defendant convicted of a capital offense at either death or life without parole. In addition, the Alabama Court of Criminal Appeals and the Alabama Supreme Court may reduce a sentence of death to a sentence of life without parole.

31. Alabama's Death Penalty Statute as applied and administered is not mandatory. There have been numerous instances in which defendants convicted of a capital offense under the statute have been sentenced to life without parole.

32. Alabama's Death Penalty Statute and the practice thereunder does provide standards for determining burden of proof and/or persuasion in death penalty cases.

33. Alabama's Death Penalty Statute and the practice thereunder is not standardless, arbitrary, or otherwise defective.

34. The trial court's oral charge under the facts and circumstances of petitioner's case was not deficient, and it did not deprive petitioner of due process of law.

35. Petitioner, through his counsel, expressed satisfaction with the oral charge which was given at his

trial and did not object to it. In effect at the time of petitioner's trial was a contemporaneous objection rule, and petitioner's failure to object to the oral charge bars review of it.

36. Petitioner's failure to object to the oral charge at trial and petitioner's failure to make a showing of cause and prejudice bars federal habeas corpus review of the issue.

37. Petitioner's conviction and sentence were not obtained in violation of his rights guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution.

38. While petitioner was tried before a jury and while his guilt was proven in that jury trial beyond a reasonable doubt, petitioner did plead guilty at arraignment and at trial. (Ex. A, 6, 48-54, 62-71, 206-216, 285-286) Because petitioner pleaded guilty, review of his conviction and sentence in this proceeding is limited.

39. All claims and averments in the amended petition which are not specifically admitted herein are hereby expressly denied.

* * *

42. Exhibit A, the two-volume record of the proceedings in the Circuit Court of Mobile County, Alabama, is hereby expressly incorporated as part of this Answer.

Action Requested

Wherefore, respondents ask this Court to:

(A) Dismiss the amended petition with prejudice; or

(B) Dismiss a judgment in favor of respondents based upon the pleadings; or

(C) Enter summary judgment in favor of respondents.

Respectfully submitted,

/s/Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL

/s/Ed Carnes
ED CARNES
ASSISTANT ATTORNEY
GENERAL

ATTORNEYS FOR
RESPONDENTS

(Address of counsel and certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN LOUIS EVANS, III, Petitioner,	)	
vs.	)	CIVIL ACTION
ROBERT G. BRITTON, et al., Defendants.	)	NO. 79-0200-H

JUDGMENT

This matter came on for trial before the Court, Honorable W. B. Hand, District Judge, presiding, and the issues having been duly tried, in accordance with the Memorandum Opinion entered herewith, it is,

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus be and the same is hereby DENIED, with all costs of action taxed against the petitioner.

It is further ORDERED that the stay of execution heretofore entered by this Court on April 20, 1979, effective since April 26, 1979, is hereby DISSOLVED.

DONE this 12th day of June, 1979.

/s/W. B. Hand
UNITED STATES
DISTRICT JUDGE

U. S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED ON THIS THE
12th DAY OF JUNE, 1979
MINUTE ENTRY NO. 49,312
WILLIAM J. O'CONNOR, CLERK
BY: /s/G. Walter
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted in printing.)

(Stamp indicating filing date of July 1, 1980, omitted in printing.)

APPELLEES' MOTION TO CERTIFY QUESTIONS OF ALABAMA LAW TO THE ALABAMA SUPREME COURT

Appellees in the above-styled cause move this Honorable Court to certify to the Alabama Supreme Court state law questions which will avoid in whole or part the federal constitutional issues involved in this appeal or at least substantially modify the nature of the federal constitutional issues. Further specification and grounds for this motion are as follows:

1. The Alabama law questions which should be certified to the Alabama Supreme Court are these questions (hereafter referred to as "the specified state law questions"), or these questions in substance:

a. Is the preclusion clause which was ruled unconstitutional by the United States Supreme Court in *Beck v. Alabama*, No. 78-6621 (U.S. June 20, 1980), severable from the remainder of the Alabama Capital Punishment Statute?

b. In view of the decision in *Beck v. Alabama, supra*, is any other part of the Alabama Capital Punishment Statute due to be struck and severed from the remainder of the statute?

c. In view of the evidence at his trial would Appellant Evans have been entitled, as a matter of state law, to have the jury instructed on any lesser included non-capital offense had it not been for the existence of the preclusion

clause which was struck down in *Beck v. Alabama, supra?*

d. When he was arrested, before the grand jury, and at his trial, Evans repeatedly confessed his guilt of the capital offense for which he was convicted. He entered a guilty plea at arraignment and signed a written "Motion to Enter Guilty Plea" at his trial. At all stages of the prosecution, Evans asked that he be convicted and sentenced to death. What effect does that course of conduct have as a matter of state law — what rights and claims of error, if any, did Evans waive under state law?

e. In view of *Beck v. Alabama, supra,* is Evans now entitled, as a matter of state law, to have his conviction or sentence reversed?

f. Under the Alabama Capital Punishment Statute, what is the burden of proof to be applied by the trial court judge to disputed factual issues, if any, at the sentence hearing?

g. Evans was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) offense of robbery-intentional killing, and one of the aggravating circumstances that the trial court judge found and considered at the sentence hearing was the § 13-11-6(4) circumstances that the capital felony involved robbery. Was this finding a correct interpretation and application of the statute?

2. There are no clear controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions.

3. The resolution of the specified state law questions by the Alabama Supreme Court will avoid in whole or in part the federal constitutional issues involved in this appeal or will at least substantially modify the nature of the federal constitutional issues.

4. Until the specified state law questions are authoritatively determined by the Alabama Supreme Court, it is impossible to define precisely the federal constitutional issues presented in this appeal.

5. The proper, authoritative, and correct resolution of the specified state law questions vitally affects public policy of the State of Alabama and is a matter of great importance to numerous defendants and to all of the people of Alabama.

6. It is essential that the state and federal courts speak with one voice as to the specified state law questions, and the authoritative and final voice on Alabama law is the Alabama Supreme Court.

7. Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. Alabama Constitution, Article VI §140(b)(3), as amended by Amendment No. 328; Alabama Rule of Appellate Procedure 18.

WHEREFORE, Appellees respectfully request this Court to certify the specified state law questions to the Alabama Supreme Court, or in the alternative, to order the parties to submit to this Court a proposed agreed statement of facts and certificates of state law questions to be transmitted to the Alabama Supreme Court.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General
By-

/s/Ed Carnes
ED CARNES
Assistant Alabama
Attorney General

COUNSEL FOR
APPELLEES

(Certificate of service omitted in printing.)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2674

D. C. Docket No. CA-79-0200-H

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner,
Alabama Board of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Respondent-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

Before VANCE and SAM D. JOHNSON, Circuit Judge,
and THOMAS,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

---

*United States District Judge for the Southern District of Alabama, sitting by designation.

the said District Court in this cause be, and the same is hereby, reversed:

It is further ordered that respondents-appellees pay the costs on appeal to be taxed by the Clerk of this court.

October 15, 1980

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

Issued as Mandate:

(A copy of the court's March 9, 1981 opinion was attached to the judgment. That opinion, which is reproduced at pp. 3a-14a of the appendix to the certiorari petition, is not reproduced here.)

SUPREME COURT OF THE UNITED STATES

No. 80-1714

Robert G. Britton, Commissioner, Alabama Department of Corrections and Joseph Oliver, Warden,

Petitioners

v.

John Louis Evans, III

Respondent

ORDER ALLOWING CERTIORARI. Filed June 22, 1981.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1714

ROBERT G. BRITTON, Commissioner, Alabama Department of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Petitioners,

v.

JOHN LOUIS EVANS, III,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, John Louis Evans, III, by his undersigned counsel, asks leave to file the attached Memorandum Opposing Certiorari and to proceed in forma pauperis pursuant to Rule 53. Counsel has not yet received an affidavit from the petitioner, who is in the custody of the State of Alabama at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Evans affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

Respectfully submitted,

JOHN L. CARROLL
DENNIS N. BALSKE
1001 S. Hull Street
Montgomery, AL 36104
205/264-0286

STEVEN A. REISS
2555 N Street N.W.
Washington, D. C. 20037

ATTORNEYS FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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No. 80-1714

ROBERT G. BRITTON, Commissioner, Alabama Department of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Petitioners,

v.

JOHN LOUIS EVANS, III,

Respondent.

AFFIDAVIT

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

JOHN L. CARROLL, being duly sworn, states:

1. I am counsel to John Louis Evans, III in Britton v. Evans, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Evans' motion for leave to proceed in forma pauperis. My representation of Mr. Evans is without renumeration.

2. Mr. Evans is presently in the custody of the State of Alabama and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Evans by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Evans is attached hereto.

3. Respondent had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Evans is unable to pay the costs of this casue or to give security for same.

5. I believe that Mr. Evans is entitled to redress in this cause for the reason that his conviction and sentence of death

were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

JOHN L. CARROLL

SWORN to and subscribed before me, this 15th day of May, 1981.

Notary Public

My commission expires: 11/1/81.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RECEIVED
MAY 18 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-1714

ROBERT G. BRITTON, Commissioner, Alabama Department of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Petitioners,

v.

JOHN LOUIS EVANS, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

In its petition for a writ of certiorari, the state asked this Court to defer its decision on the petition until after the Alabama Supreme Court rendered its decision in Ritter v. State, a case remanded by this Court to the Alabama Supreme Court in light of this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980). See Ritter v. Alabama, ___ U.S. ___, 100 S.Ct. 3044 (1980). The state requested that this Court's disposition of its petition in this case be held in abeyance pending the outcome of Ritter because "[t]he federal constitutional issues and the underlying state law questions in the Ritter appeal are identical to those in the present case ...." Petition at 59. Because Ritter's case is identical to Evans', the state recognized that "if the Alabama Supreme Court holds that in view of the Beck decision [Ritter] is entitled to a new trial as a matter of state law, that holding will moot not only this petition but this entire federal habeas proceeding." Petition at 60.

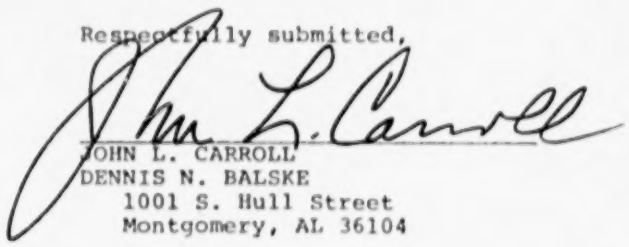
The Alabama Supreme Court has just handed down its decision in Ritter, and has ruled that, as a matter of state law, Ritter

10/

is entitled to a new trial. Ritter v. State, ___ So.2d ___ (May 9, 1981, No. 77-798). (A copy of the decision is attached as Appendix A). Thus, as the state concedes, Evans too is entitled to a new trial under state law. The Alabama Supreme Court's decision in Ritter confirms the correctness of the Fifth Circuit's decision in this case and, as the state concedes, renders the state's petition in this case moot.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

MAY 8 1981

THE STATE OF ALABAMA - - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

Ex parte Wayne Eugene Ritter

·77-798 PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19,

1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of

Beck v. Alabama, ___ U. S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus

offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read Beck as suggesting that a pre-Beck

capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital

---

1. As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria,

2. See Brady v. United States, 397 U. S. 742 (1970).

is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 8 day of May 1981

J O Sentell

Clerk, Supreme Court of Alabama

---

3. See Brady v. Maryland, 373 U. S. 84 (1963); Parker v. North Carolina, 397 U. S. 790 (1970).

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1714

ROBERT G. BRITTON, Commissioner, Alabama Department of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Petitioners,

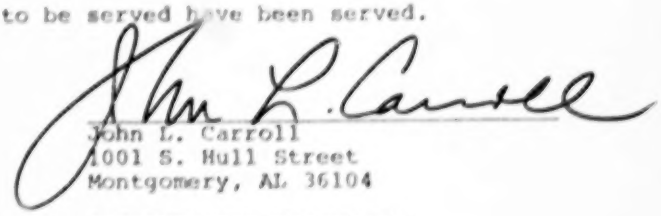
v.

JOHN LOUIS EVANS, III,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1981, three copies of the Memorandum Opposing Certiorari and Motion to Proceed in forma pauperis were mailed, postage prepaid, to Hon. Ed Carnes, Assistant Attorney General, 250 Administrative Building, Montgomery, Alabama 36130, counsel for the petitioners. I further certify that all parties required to be served have been served.



John L. Carroll
1001 S. Hull Street
Montgomery, AL 36104

ATTORNEY FOR RESPONDENT

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and
JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

CHARLES A. GRADDICK
Alabama Attorney General

EDWARD E. CARNES
Assistant Alabama Attorney General

Counsel of Record

SUSAN BETH FARMER
Assistant Alabama Attorney General

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
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Counsel for Petitioners

QUESTIONS PRESENTED

1. Does *Beck v. Alabama*, 447 U.S. 625 (1980), require the reversal of all Alabama pre-*Beck* capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of *Bellotti v. Baird*, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

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NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, et al.,

Petitioners

v.

JOHN LOUIS EVANS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. The opinion of the United States District Court for the Southern District of Alabama, denying Respondent Evans' petition for a writ of habeas corpus is reported as *Evans v. Birtton*,[1] 472 F. Supp. 707 (S.D. Ala. 1979), and is contained in the Certiorari Petition Appendix at pp. 46a -128a.

[1]The caption of the district court opinion misspells the name of Robert G. Britton, then Commissioner of the Alabama Department of Corrections. (R. 54, 76)

2. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the district court's denial of the habeas petition, with one judge dissenting, is reported as *Evans v. Britton*, 628 F. 2d 400 (5th Cir. 1980), and is contained in the Certiorari Petition Appendix at pp. 15a -22a.

3. The extension of the opinion of the United States Court of Appeals for the Fifth Circuit, in denying rehearing with one judge dissenting, is reported as *Evans v. Britton*,[2] 639 F. 2d 221 (5th Cir. 1981) (on rehearing), and is contained in the Certiorari Petition Appendix at 3a - 14a.[3]

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §§ 1254(1) and 2101(c), and Rule 20.4, the court below having reversed the district court's decision in a civil proceeding brought under 28 U.S.C. §2254, and having denied rehearing on March 9, 1981 (A. 2; Pet. App. 3a - 14a).[4]

The judgment of the court below has been stayed since March 12, 1981 (A. 2), and this Court granted a writ of certiorari on June 22, 1981 (A. 74).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, which provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

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[2]Since the certiorari petition was granted on June 22, 1981, the name of this case has been changed pursuant to the automatic substitution provision of Rule 40.3.

[3]The state appellate court opinions affirming Evans' conviction and sentence are reported as *Evans v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

[4]References to "A." are to the joint appendix. References to "Pet. App." are to the appendix to the certiorari petition.

2. 28 U.S.C. §2254, which is reproduced in the Certiorari Petition Appendix at 129a - 134a.

3. Alabama Rule of Appellate Procedure 18, which is reproduced in the Certiorari Petition Appendix at 30a-33a.

STATEMENT OF THE CASE

The Facts Concerning the Crime

In September of 1976, respondent Evans was released on parole from an Indiana prison. (A. 8; Tr. 231-232, 238, 321)[5] Before being released, Evans had made plans with an inmate named Wayne Eugene Ritter to go on a cross-country crime spree when they got out. (A. 8-9) After leaving Indianapolis on Christmas Day, 1976, Evans and Ritter committed armed robberies in three different states. (A. 9) They then went to Mobile, Alabama to commit another robbery. (A. 10, 39)

On January 5, 1977, in Mobile, Evans and Ritter robbed a pawn shop where Edward A. Nassar was employed. (A. 10-12, 38-40) During the robbery, Evans murdered Nassar by shooting him in the back while Nassar's seven- and nine-year-old daughters watched. (A. 6, 10-13, 38-41; Tr. 142-145) Nassar was not the first man Evans had killed (A. 21) Evans fully understood the consequences of his acts in shooting Nassar (A. 19), and Evans felt no remorse over it. (A. 42)

In the two months after the robbery and murder of Nassar, Evans and Ritter committed numerous violent crimes, including kidnappings with extortion and more than a dozen robberies, in seven different states. (A. 12-15; Tr. 288-292) At one point during the crime spree, Evans telephoned an F.B.I. agent about turning himself in. (A. 20-22) Evans told the agent that "[i]f they still have the death penalty, then, you know, maybe I'll do it," but that if he could not get the death penalty then he would not turn

[5]References to "R." are to the record on appeal. References to "Tr." are to the two-volume state trial court transcript which was Exhibit A to the habeas answer in district court and is part of the record on appeal. (A. 1, 4; R. 65)

himself in. (A. 22) Because the agent could not guarantee Evans anything, he did not turn himself in. (A. 22; Tr. 336)

On March 7, 1977, Evans and Ritter were finally captured in Little Rock, Arkansas by F.B.I. agents. (Tr. 156-158, 163, 166) The pistol with which Nassar had been murdered was found in Evans' motel room (Tr. 142-145, 157-158, 161-162, 198-200), and a pistol which had been stolen from the pawn shop during the robbery was recovered in the automobile in which Ritter was apprehended. (Tr. 159-162, 220-221)

On March 8, 1977, two F.B.I. agents questioned Evans in Little Rock. (Tr. 167) After being advised of and waiving his *Miranda* rights, Evans signed a written statement in which he freely confessed his involvement in the robbery and murder of Nassar. (A. 6-7; Tr. 170-174, 273-274) Evans also signed written statements confessing his involvement in numerous other crimes in other states. (Tr. 170)

Evans waived extradition and was transported to Mobile where on March 11, 1977, after being advised of his *Miranda* rights by members of the Mobile Police Department, he voluntarily confessed to the robbery and murder of Nassar and to numerous other crimes. (Tr. 288-292, 331) Evans told the Mobile police officers that he wanted to be sentenced to death at the earliest possible date. (Tr. 291)

After his return to the state, Alabama authorities received warrants from four other states charging Evans with numerous crimes of burglary, armed robbery, and kidnapping. (Tr. 233-234, 348-370) Those states and others indicated a desire to prosecute Evans if he was not executed by Alabama. (Tr. 233-234)

The State Trial Court Proceedings

On April 4, 1977, Evans voluntarily appeared before the Mobile County Grand Jury and, against the advice of his attorneys, freely testified at length about the robbery and murder of Nassar. (A. 8-23; Tr. 3, 230-233, 318-337) Evans told the grand jury that he fully understood the consequences of his action in shooting Nassar, that Nassar was not the first man he had killed, and that he would not hesitate to kill again. (A. 12, 19, 21) Evans testified that if

he was ever freed he would go back to robbery, which he described as the easiest way he knew of to make money. (A. 18, 21)

Evans also told the grand jury that he wanted to be indicted as soon as possible, that he intended to plead guilty, and that he preferred execution to life in prison. (A. 17, 22) Evans said that even before he was captured, "I figured that I would get the electric chair anyway, you know, some place." (A. 20)

On April 8, 1977, the Mobile County Grand Jury indicted Evans for the crime of robbery during which the course of which the victim is murdered (Tr. 1), which is a capital offense under *Code of Alabama* 1975, §13-11-2(a)(2).

At arraignment on April 18, 1977, against the advice of his attorneys, Evans pleaded guilty. (A. 24-25; Tr. 67-71) The trial court judge entered the guilty plea in the official minutes of the court. (A. 26) Notwithstanding that plea, the case was submitted to a jury for the reasons discussed on pp. 37 - 39, *infra*.

Although stating that Evans "appears to me to be sane," the judge granted a motion which Evans' attorneys had previously filed to have him examined by a psychiatrist. (Tr. 2, 64, 69) After examining Evans, the appointed psychiatrist reported to the court that Evans was competent, rational, and able to stand trial. (A. 27-28; Tr. 94-95) The psychiatrist further reported that Evans understood thoroughly the nature and results of his actions, knew the difference between right and wrong, and often chose wrong. (A. 27) He also concluded that Evans sincerely preferred execution to a long prison sentence. (A. 28)

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) Prior to the beginning of the trial, while the judge was qualifying the potential jurors, Evans asked the judge to make sure that none of the jurors had any hesitancy about returning a verdict of death by electrocution. (A. 29-30)

The State's evidence at trial included two eyewitnesses who positively identified Evans, expert testimony matching the death bullet to Evans' pistol, and Evans' confession to the F.B.I. (Tr. 100-101, 131-133, 142-162, 182-183, 198-

200, 277-278)[6]

After the State rested, Evans filed a written "Notice to Enter Guilty Plea," which he had signed acknowledging and waiving his constitutional right not to plead guilty. (A. 33-37) Evans' written guilty plea was accepted by the court and admitted into evidence. (A. 33-37; Tr. 252)

Thereafter, Evans took the stand and testified against himself. (A. 38-42) As his own direct examination, Evans told the jury:

> MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say. (A. 38)

On cross-examination, Evans testified that he had shot Nassar in the back, and that he did not feel any remorse about it: "Not at all". (A. 41-42) Evans also acknowledged that his attorneys had advised 20 to 30 times not to pursue the course of action he was pursuing at trial. (A. 42)

After Evans testified, his co-defendant Ritter took the

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[6]The State's evidence is detailed in *Evans v. State*, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

stand. (Tr. 216-221) In his testimony, Ritter confessed his part in the crime and implicated Evans. (Tr. 218-221)

The jury took fewer than fifteen minutes to convict Evans of the capital offense. (Tr. 226-227) Following a sentence hearing held on April 27, 1977, the trial court judge entered written findings concerning aggravating and mitigating circumstances in the case, found that "the aggravating circumstances far outweigh the mitigating circumstances," and sentenced Evans to death for that reason. (Tr. 9-15, 229-243)[7]

The State Appellate Court Proceedings

Evans' conviction and sentence were automatically appealed pursuant to *Code of Alabama* 1975, §§12-22-150 and 13-11-5, and were affirmed by the Alabama Court of Criminal Appeals in *Evans v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977). The Alabama Supreme Court affirmed in *Evans v. State*, 361 So. 2d 666 (Ala. 1978), and this Court denied certiorari in *Evans v. Alabama*, 440 U.S. 930 (1979).[8]

The Federal District Court Proceedings

On April 12, 1979, Evans filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, which had jurisdiction pur-

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[7]Ritter was also convicted of the capital offense (Tr. 29, 227) and sentenced to death. (Tr. 30-35)

[8]The capital conviction and death sentence of co-defendant Ritter were also initially affirmed in *Evans and Ritter v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977), *remanded*, 361 So. 2d 666 (Ala. 1978), *aff'd on remand*, 375 So. 2d 266 (Ala. Cr. App. 1978), *aff'd*, 375 So. 2d 270 (Ala. 1979), *vacated and remanded*, 448 U.S. 903 (1980), but were reversed in *Ritter v. State*, No. 77-798 (Ala. May 8, 1981) (on remand), *extended on rehearing, id.*, (Ala. June 12, 1981), *certiorari pending*, No. 81-247 (filed August 6, 1981).

The Alabama Supreme Court's as yet unpublished opinions in the *Ritter* case on remand from this Court are reproduced as Appendices A and B to this brief, pp. 1a - 15a, *infra*.

suant to 28 U.S.C. §2254. (A. 48-51; R. 1-6)[9] The petition, as amended, averred that Evans' conviction and sentence were obtained in violation of his Eighth and Fourteenth Amendment rights. (A. 49-50, 57)

The amended petition averred that Evans was convicted and sentenced under a statute which, *inter alia*, precluded consideration of lesser included offenses supported by the evidence, and that preclusion of evidentially supported lesser included offenses violates the due process and equal protection clauses and contributes to a "net result" under Alabama's statute of unreliable sentencing in violation of the Eighth Amendment. (A. 49-50, 57) However, the amended petition did *not* aver that there was any evidence at Evans' trial that would have supported consideration of any lesser included offense verdict, but instead admitted that Evans "testified at trial, admitted guilt and asked to be executed." (A. 48) The amended petition did *not* aver that had the preclusion clause not existed Evans would have presented some evidence to support a lesser included offense theory, nor did it aver that the preclusion clause or any other provision of the statute affected Evans' trial strategy in any way whatsoever. No averments that the preclusion clause harmed or prejudiced Evans were made. (R. 1-8, 52-53)

The amended petition also attacked the sentencing provisions of the statute under which Evans was convicted, characterizing the jury verdict as a "mandatory jury-fixed death sentence," which violated the Eighth and Fourteenth Amendments. (A. 49-50; R. 52) However, the amended petition acknowledged that Evans had asked to be executed (A.

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[9]After certiorari was denied, a next-friend habeas petition and application for stay was filed by Evans' mother. That proceeding is reported as *Evans (Betty) v. Bennett*, 467 F. Supp. 1108 (S.D. Ala. 1979), *temporary stay granted*, 440 U.S. 1301 (1979) (Rehnquist, J., as Circuit Justice), *stay denied*, 440 U.S. 987 (1979) (misc. order).

After a temporary stay was granted against his wishes in that next-friend proceeding, Evans decided to contest his conviction and sentence. *Evans (Betty) v. Bennett*, 440 U.S. 987 (1979) (misc. order denying stay) (concurring statement of Brennen, J.). (R. 40-41). The record does not reveal why Evans changed his mind. But see, R. 44-48.

48), and it did not aver that Evans was harmed or prejudiced by the sentencing provisions of the statute or that the sentence Evans received was affected by those provisions. (R. 1-8, 52-53)

The answer filed by petitioners (respondents there) denied that any of Evans' constitutional rights had been violated. (A. 59-66) It averred that Evans, after being fully advised of his rights, had voluntarily confessed his guilt at each stage of the proceedings which led to his conviction and sentence (A. 59), and had asked to be convicted, sentenced to death, and executed. (A. 60) It also averred that Evans had pleaded guilty at arraignment and trial, and that because of his guilty plea review of Evans' conviction and sentence in this proceeding was limited. (A. 59, 65)

A hearing on the petition was held by the district court on May 17, 1979. (A. 4; H.Tr. 1-88)[10] At that hearing, petitioners (respondents there) argued that Evans had not been entitled to have the jury consider any lesser included offense verdict because there was no evidence to support such a verdict. (H.Tr. 75) Evans did not argue to the contrary and although he presented evidence on another issue (H.Tr. 20-31), Evans presented no evidence that he had been harmed by the existence of the preclusion clause, nor did he present any evidence that the preclusion clause had influenced the course of action he pursued at trial. (H.Tr. 1-88) Instead, Evans' sole contentions were that the statute was unconstitutional "on its face" and as "applied statewide." (H.Tr. 34, 43)

On June 12, 1979, the district court entered an order denying Evans' petition (A. 67), and issued an opinion reported as *Evans v. Birtton*,[11] 472 F. Supp. 707 (S.D. Ala. 1979). (Pet. App. 46a-128a) In its opinion, the court found that Evans "had pled guilty, voluntarily and with full knowledge of his *Boykin* rights, on four separate occasions,

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[10]References to "H.Tr." are to the transcript of the hearing on the petition held in the district court, which is part of the record on appeal. (A. 5)

[11]See n. 1 on p. 1, *supra*.

at least once before the jury." 472 F. Supp. at 711 & n. 1, 712 n. 2. (Pet. App. 53a - 54a, 119a - 1.

The Federal Appellate Court Proceedings

Evans appealed to the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. §2253. After submission of the appeal, this Court issued its opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), holding it unconstitutional to execute a capital defendant whose jury had not been permitted to consider a lesser included non-capital offense verdict when the evidence at trial would have supported such a verdict.

On July 1, 1981, petitioners (appellees below) filed a motion requesting the Fifth Circuit to certify to the Alabama Supreme Court specified questions of Alabama law — some of which were raised in the wake of the *Beck* decision — the answers to which would either avoid in whole or in part the federal constitutional issues or would at least modify those issues. (A. 1) (That motion is reproduced at A. 68 - 71.)

Thereafter, the court below ordered supplemental briefs concerning the effect of the *Beck* decision on Evans' case. Petitioners argued that Evans' case was distinguishable from *Beck* both because there was no evidentiary basis for a lesser included offense verdict at Evans' trial and because Evans had pleaded guilty. Evans, on the other hand, argued that guilty pleas had no effect in capital cases as a matter of Alabama law and that he was entitled to a new trial. Petitioners argued that the state law issues should be certified before the federal constitutional issues were decided, and Evans argued to the contrary.

On October 15, 1980, the Fifth Circuit reversed the district court in a decision reported as *Evans v. Britton*, 628 F. 2d 400 (5th Cir. 1980). (Pet. App. 15a - 22a) In a per curiam opinion, the two-judge majority held that Evans' conviction and sentence must be set aside as a federal constitutional matter and refused to certify the related state law questions to the Alabama Supreme Court. One judge dissented because of the failure to certify at least one of the state law questions. 628 F. 2d at 401-402 (Thomas, J., dis-

senting). (Pet. App. 21a - 22a)

Petitioners then filed a petition for rehearing with a suggestion for rehearing en banc. (A. 2) On March 9, 1981, the Fifth Circuit panel extended its original opinion, *Evans v. Britton*, 639 F. 2d 221 (5th Cir. 1981) (on rehearing) (Pet. App. 3a - 14a), but denied the petition in all other respects. One judge continued to dissent for the reasons he had stated in the initial opinion. 639 F. 2d at 224. (Pet. App. 12a)[12]

The Fifth Circuit's judgment has been stayed since March 20, 1981 (A. 2), and this Court granted certiorari on June 22, 1981. (A. 74)

SUMMARY OF ARGUMENT

Beck v. Alabama, 447 U.S. 625 (1980), held that it was unconstitutional to prevent a capital jury from considering a lesser included offense verdict which is supported by the evidence at trial, but that holding does not foreclose the issues in this case. In *Beck* there was evidence to support lesser offense instructions which would have been given had it not been for the preclusion clause, and the grant of certiorari and holding were carefully limited to those facts. No other issues were presented or argued. The "in every case" language in the *Beck* opinion, 447 U.S. at 642-643, refers to every case within the grant of certiorari and holding — every case in which the evidence at trial would support a lesser offense verdict. Applying the "in every case" language to cases like this one in which there was no evidentiary basis for lesser offense instructions would mean not only that *Beck* sub silentio overruled prior decisions of this Court, but also that it invalidated virtually every capital punishment statute in this country.

Evans' conviction should not have been set aside for three independently adequate reasons. First, since Evans was not prejudiced by the preclusion clause, its mere existence did not violate his constitutional rights. Second, even

[12]Petitioners efforts after the panel denied rehearing to clarify the en banc status of the case in the court below were unsuccessful. (A. 2) See, the Petition at 14 & n. 7, and Pet. App. at 39a - 45a.

assuming that the existence of the clause violated some constitutional right of Evans, his conviction should not have been set aside absent a showing of harm. Third, the guilty plea which Evans voluntarily entered waived any constitutional violation concerning the preclusion clause and rendered it irrelevant.

Evans has never established or even pleaded that he was harmed or prejudiced in any way by the preclusion clause, and the record clearly establishes that he was not. There was no evidentiary basis for a lesser offense verdict at the trial. Not only was there no dispute about any element of the capital offense, but Evans repeatedly admitted, confessed, and bragged about his guilt at every stage of the prosecution, including the trial. Since the jury would not have received any lesser offense instructions if the preclusion clause had not existed, the clause did not operate at all in Evans' case.

Nor did the preclusion clause stop or even discourage Evans from presenting lesser offense evidence. The record shows that the single-minded course of conduct which Evans followed throughout the state court proceedings was caused not by the preclusion clause but rather by his desire for notoriety and his preference for death over a long prison term. Given his determination to be free or die, Evans had everything to gain and nothing to lose by presenting lesser offense evidence while the preclusion clause existed. Because the preclusion clause removed from a lesser offense strategy the possibility of the one thing that Evans feared the most — a long prison term — the existence of the clause actually acted as an incentive for Evans to present lesser offense evidence. Evans chose to pass up that incentive in favor of a headline grabbing, self-destructive course of conduct. He made that choice in spite of the preclusion clause, not because of it.

Under this Court's decisions prejudice must be shown in order to establish a violation of the due process right to fundamental fairness. This Court's decisions also establish that even where a constitutional violation exists a conviction should not be set aside absent a showing of harm. The requirement of harm and prejudice is especially important

in habeas corpus proceedings because the issuance of writs of habeas corpus undercuts finality and inflicts substantial costs on society, on our system of justice, and on our federal fabric. The court of appeals erred in ordering Evans' conviction set aside on the basis of that court's speculation —never even pleaded by Evans — that he might somehow have been harmed by the preclusion clause. That speculation not only has no basis in fact but in the face of the record is wholly incredible. The burden of proving harm and prejudice is on the habeas petitioner, and Evans failed to carry that burden.

An alternative reason why the conviction should not have been set aside is that Evans pleaded guilty at arraignment and during trial. A valid guilty plea conclusively establishes factual guilt for purposes of appeal thereby rendering irrelevant any defect in the factfinding process, and such a plea also waives all non-jurisdictional defects. Because the sole danger of the preclusion clause was that it increased the risk of an erroneous factfinding concerning guilt in certain circumstances, Evans' guilty plea which conclusively established his guilt for purposes of appeal rendered the existence of the preclusion clause constitutionally irrelevant in his case. Because any constitutional claim concerning the preclusion clause is non-jurisdictional in nature, Evans' guilty plea waived such a claim.

The court of appeals' conclusions that Evans' guilty plea was rejected by the state trial court and that a guilty plea in a capital case has no effect under Alabama law are wrong. As the district court explained, the case against Evans was submitted to a jury not because his guilty plea was rejected, but because all capital cases are submitted to a jury in Alabama since only a jury can sentence a defendant to death. Notwithstanding that rule, under Alabama law a guilty plea when combined with a jury verdict of guilt based on additional proof is effective both to conclusively establish for purposes of appeal the factual guilt of a capital defendant and to waive any and all non-jurisdictional defects in the proceedings.

The court of appeals' misinterpretation of Alabama

law concerning guilty pleas in capital cases underscores the error the court committed when it failed to certify that and other state law questions raised in the wake of the *Beck* decision to the Alabama Supreme Court. The court of appeals' holding that certification is not necessary where a court concludes that the federal Constitution requires reversal in any event stands the rule of *Bellotti v. Baird*, 428 U.S. 132 (1976), on its head, and undermines the important values that certification serves. The rule of *Bellotti* is that state law questions should be certified and answered in order to narrow or avoid federal constitutional issues, not the converse. If this Court concludes that the state law issues in this case should be certified to the Alabama Supreme Court before the federal issues are addressed, then this Court should itself certify those questions to that court.

This Court should reverse the court of appeals' judgment ordering that the writ of habeas corpus issue, or in the alternative, before addressing the federal issues this Court should certify the state law questions involved in this case to the Alabama Supreme Court.

ARGUMENT

I.

THE DECISION IN *BECK v. ALABAMA*, 447 U.S. 625 (1980), DOES NOT FORECLOSE CONSIDERATION OF THE VALIDITY OF EVANS' CONVICTION AND SENTENCE

In *Beck v. Alabama*, 447 U.S. 625 (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the evidence at his trial would have supported a lesser included non-capital offense verdict which the jury was not permitted to consider. In the *Beck* case, there was evidence to support a lesser offense instruction and the jury which convicted Beck would have received such an instruction if the statutory preclusion

clause had not operated to prevent it. 447 U.S. at 629-30. Alabama conceded that much, *id.*, at 630 n. 5, and this Court carefully limited its grant of certiorari and holding accordingly. The very first paragraph of the *Beck* opinion expresses that limitation as follows:

> We granted certiorari to decide the following question:
>
> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and *when the evidence would have supported such a verdict*?" 444 U.S. 897
>
> We now hold that the death penalty may not be imposed *under these circumstances.*

447 U.S. at 627 (emphasis added). The limitation of the decision to "these circumstances" in *Beck* is not surprising, because Beck himself did not ask the Court to address any other circumstances and Alabama specifically requested the Court not to do so.[13]

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[13]Beck stated in his brief that, ". . . Alabama's standard for lesser-offense verdicts in non-capital cases, which is all petitioner asserts should apply, limits lesser-offense instructions to cases where there is at least some evidence supporting a lesser-offense verdict," Reply Brief of Petitioner, *Beck v. Alabama*, (U.S. Oct. Term, 1979, No. 78-6621), at 13 n. 11; and he stated at argument that, "We contend that there had to be some evidence, and the state concedes that there was some evidence." Tr. Oral Arg., *Beck v. Alabama*, *supra*, at 9. In its brief, Alabama requested the Court not to decide in *Beck* the fate of any pre-*Beck* capital cases in which there was no evidentiary basis for a lesser offense verdict — and it named Evans' case as an example —because the issues that would be involved in such a case were not presented by the facts in *Beck*, had been excluded by the certiorari order, and had not been briefed. Brief for Respondent, *Beck v. Alabama*, *supra*, at 77-78 & n. 46.

A. The Court Below Interpreted the *Beck* Decision to Mandate the Reversal of All Pre-*Beck* Capital Convictions

In the present case the two-member court of appeals majority, disregarding the careful limitations expressly placed on the *Beck* decision by this Court, held that the decision mandates that all pre-*Beck* Alabama capital convictions be reversed regardless of the circumstances in a particular case. 628 F. 2d at 401 (Pet. App. 17a - 21a); 639 F. 2d at 223-224 (Pet. App. 11a - 12a). It misinterpreted *Beck* as requiring what amounts to a conclusive presumption of harm for all pre-*Beck* Alabama capital cases.

The absolute nature of the presumption of harm rule perceived by the court below is illustrated by that rule's application to this case in which there was not one jot, speck, or iota of evidence to support any lesser included offense instruction. Evans not only admitted and confessed his guilt at every stage of the prosecution, including the trial, but he also even pleaded guilty to the capital offense and asked to be sentenced to death for it. See pp. 4 - 7, *supra*. After Evans had received the capital conviction and death sentence which he had so actively sought and so richly deserved, the court below held that Evans' conviction and sentence must be overturned because of the unconstitutionality of the preclusion clause, a statutory provision which did not even operate in Evans' case. See pp. 22 - 25, *infra*. Moreover, the court held that any contrary decision "has been foreclosed by the Supreme Court." 639 F. 2d at 223 (Pet. App. 11a).

The court below's misinterpretation of the *Beck* decision is based on three words — "in every case" — which appear in the *Beck* opinion on 447 U.S. at 643. By reading those three words and the paragraph in which they appear out of context, the court below erroneously concluded that this Court had held in *Beck* that every defendant who had been tried under the Alabama capital punishment statute had been subjected to unconstitutionally unreliable fact-finding regardless of the particular circumstances in his specific case. 628 F. 2d at 401 (Pet. App. 19a - 21a); 639 at 223-224 (Pet. App. 11a - 12a).

B. The Court Below's Interpretation of the *Beck* Decision is Wrong

This Court has previously held that it is precluded from deciding constitutional issues outside the scope of the question to which a grant of certiorari is specifically limited. *See, e.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-325 (1972); *Beck v. Washington*, 369 U.S. 541, 554 (1962). Accordingly, this Court limited its decision in *Beck v. Alabama*, 447 U.S. at 627 ("We now hold that the death penalty cannot be imposed *under these circumstances.*" (emphasis added)), to the issue which was framed by the certiorari order that had been tailored to fit the facts of that case. No other issue was argued or decided in *Beck*, a fact the court below ignored in favor of an overly literal reading of three words in the twenty-three page opinion.

The words "in every case," as they appear in the *Beck* opinion on 447 U.S. at 643, mean in every case within the bounds of the grant of certiorari. They mean "in every case" covered by what this Court described as "these circumstances," 447 U.S. at 627 — every case in which there was an evidentiary basis for a lesser included offense instruction which was not given. They mean in Beck's case and in all the many cases like it, but not in the unusual case like the present one in which the defendant not only does not contest his guilt, but also admits, confesses, and brags about it at every stage of the proceeding including the trial itself.

The full paragraph of the *Beck* opinion from which the court below lifted the words "in every case" is as follows:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, *the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason — its belief that the defend-*

> *ant is guilty of some serious crime and should be punished.* On the other hand, *the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death.* In any particular case *these two extraneous factors* may favor the defendant or the prosecution or they may cancel each other out. But *in every case* they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

447 U.S. at 642-643 (emphasis added; footnote omitted). The two underlined statements, describing the two "extraneous factors" involved, cannot possibly have been intended to apply to literally "every" case tried under Alabama's statute, including the present one.

Take, for example, the first statement or "extraneous factor" referred to: "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason — its belief that the defendant is guilty of some crime and should be punished." This Court cannot possibly have meant to say that in literally "every case" in which juries are not permitted to consider lesser included offense verdicts there is an intolerable level of uncertainty and a risk of unreliable factfinding, because the rule in virtually every jurisdiction in this country, including the federal courts, is that lesser included offense instructions need not be given when there is absolutely no evidence to support them. *See, e.g., Beck v. Alabama*, 447 U.S. at 634-637 (collecting state cases); *Sansome v. United States*, 380 U.S. 343, 350, 354-355 (1965) (rule in federal court).

The Constitution does not require that a capital jury be instructed on a lesser included non-capital offense which is not supported by the evidence. *See, Gregg v. Georgia*, 428 U.S. 153, 160-163, 215-216 (1976) (upholding Georgia's statute which provides for lesser included offense instructions only when such instructions are supported by a "view of the evidence"); *cf., Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 334-335 (1976) (plurality opinion) (criticizing a provi-

sion of Louisiana's mandatory capital statute which required lesser offense instructions not supported by the evidence). If this Court adopts the court below's overly literal interpretation of *Beck*'s "in every case" language, then *Beck* will have invalidated sub silentio virtually every capital punishment statute in this country, because almost all of them provide for lesser offense instructions only when such instructions are supported by the evidence.

Such an absurdly literal interpretation of *Beck*'s "in every case" language is not required, as the passage in question itself reveals. In that passage, this Court explained that the absence of lesser offense verdict options "may encourage the jury to convict for an impermissible reason" when the jury has a "belief that the defendant is guilty of some serious [lesser included] crime and should be punished." *Beck v. Alabama*, 447 U.S. at 642. The only time the jury could rationally reach a "belief that the defendant is guilty of some serious [lesser included] crime," is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offense verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph of the *Beck* opinion in question, which is that: "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." 447 U.S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the *Beck* decision, because this Court pointed out that there had been a 96% conviction rate in pre-*Beck* capital cases. 447 U.S. at 641 & n. 18. Surely, a 4% acquittal rate is not intolerably high.

What this Court did mean in the paragraph in question is evident from the particular argument that it was written

to answer. Alabama had argued that any effect the preclusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirement. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. *Beck v. Alabama*, 447 U.S. at 638-641. This Court rejected that argument, *id.*, at 639-643, but the important point here is that the language of the *Beck* opinon referring to an intolerable risk of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that *in every case like Beck's* in which there was an evidentiary basis for a lesser included offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case — "in every case" like Beck's — there would be uncertain and unreliable factfinding. But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser offense and should not be acquitted for that reason.[14]

The error which the court below committed in misinterpreting the *Beck* decision is illuminated by *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-462 (1978). The

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[14]Nor do defendants like Evans have any basis for complaint about the jury verdict form used in pre-*Beck* cases. Its only possible effect would be to encourage the jury to acquit a defendant who should be convicted. *Beck v. Alabama*, 447 U.S. at 639-640, 642-643. Since there was only a 4% acquittal rate, *id.* at 641 & n. 18, there is no evidence that the verdict form resulted in any improper acquittals.

In any event, Evans should not be heard to complain about being convicted under a procedure which might have encouraged the jury to erroneously *acquit* him. If the verdict form procedure erred in the present case, it erred in Evans' favor, and Evans was convicted in spite of it, not because of it.

holding reached in *Zenith* was contrary to "certain broad language," *id.*, at 460-461, in an earlier opinion dealing with the same subject matter. While recognizing that the language would be controlling if taken out of the context of that earlier case, this Court refused to do so, because even though the literal language seemed to cover the issue at hand in *Zenith*, "neither the parties nor this Court [had] focused carefully" on that issue in the earlier case, and it had not been argued then. *Id.*, at 460-462. Since "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *id.*, at 462, this Court felt free in *Zenith* to address the issue raised by the facts of that case unconstrained by the broad language of the prior case which had involved different facts. Likewise, this Court is free from *Beck*'s broad "in every case" language, because the issue here, being well outside *Beck*'s carefully limited certiorari and holding, 447 U.S. at 627, was neither in focus nor argued there.

In a case involving Evans' co-defendant, *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), three justices of the Alabama Supreme Court concluded that the *Beck* decision did not mandate the reversal of a pre-*Beck* conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existence of the preclusion clause. *Id.*, slip op. at 6-8, (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), pp. 2a - 7a, *infra; id.*, at 10-11 (separate opinion of Maddox, J.), pp. 8a -9a, *infra.*[15] That is the correct interpretation of the *Beck*

[15]Those three justices of the Alabama Supreme Court were out-voted by a six-member majority which concluded, "consistent[ly] with the interpretation of that decision reached by the Fifth Circuit," that the *Beck* decision "compelled" the reversal of all pre-*Beck* capital convictions regardless of the facts. *Ritter v. State, supra*, slip op. at 2 (majority opinion), pp. 1a - 2a, *infra; id.*, at 3 (Torbert, C.J., concurring specially), p. 2a, *infra.*

The fact that a majority of the Alabama Supreme Court, influenced by the two-member majority in the court below, joined that court in misinterpreting the *Beck* decision simply proves that this Court needs to correct both courts. This Court has the opportunity to correct the Alabama Surpeme Court's misinterpretation of *Beck* in *Alabama v. Ritter*, No. 81-247 (certiorari filed August 6, 1981).

decision.

II.

EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HE WAS NOT HARMED OR PREJUDICED IN ANY WAY BY THE EXISTENCE OF THE PRECLUSION CLAUSE

A. The Existence of the Preclusion Clause Did Not Harm or Prejudice Evans In Any Way

The determination whether Evans was harmed or prejudiced by the preclusion clause should be based on a two-part inquiry. First, the record should be examined to determine whether, in view of the evidence at trial, the jury which convicted Evans would have been instructed on any lesser included non-capital offenses had it not been for the preclusion clause. If the answer is no, the second inquiry should be whether the record establishes that the preclusion clause caused Evans to forego presentation of lesser included offense evidence that he would otherwise have presented at trial. The answer to both inquiries is no.

1. No Lesser Offense Instructions Would Have Been Given Anyway Because There Was No Evidence to Support Them

Under Alabama law, a defendant is entitled to a lesser included offense instruction only if there is some evidentiary basis for it — some basis in the evidence from which the jury could reasonably conclude that the defendant is innocent of the higher offense but guilty of some specific lesser offense. *See, e.g., Beck v. Alabama*, 447 U.S. at 630 n. 5, *quoting Fulghum v. State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973) (a lesser offense instruction should be given if "there is any reasonable theory from the evidence which would support the position."); *Harris v. State*, 398 So. 2d 777, 778-779 (Ala. Cr. App.), *cert. denied*, 398 So. 2d 780 (Ala. 1981); *Gray v. State*, 394 So. 2d 92, 94-95 (Ala. Cr.

App.), *cert. denied*, 399 So. 2d 840 (Ala. 1981). As the Alabama Supreme Court said when it severed the preclusion clause from the remainder of the capital punishment statute in the *Beck* case on remand: "[a]bsent the fourteen words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence." *Beck v. State*, 396 So. 2d 645, 657 (Ala. 1981) (on remand).

All four members of the Alabama Supreme Court who spoke to the point in *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), agreed that that court's *Ritter* decision in no way affected "the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser offense." *Id.*, slip op. at 3 (Torbert, C.J., concurring), p. 2a, *infra; id.*, at 11, (Maddox, J., joined by Jones and Adams, J.J., concurring specially in the denial of rehearing) (noting that "there is no disagreement among the members of the Court" that the decision "is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this cause."), p. 9a, *supra*.[16 & 17]

The preclusion clause operated only in those cases, like *Beck*, where there was an evidentiary basis for lesser

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[16]While not disagreeing with the four justices who specifically pointed out that lesser included offense instructions should only be given when supported by the evidence at trial, the majority in *Ritter v. State*, *supra*, concluded that the *Beck* decision mandated the reversal of that case, anyway. See n. 15 on p. 21, above.

[17]*Code of Alabama* 1975, §13-1-73 requires that the jury in a first degree murder case be instructed on second degree murder regardless of the evidence, but that statute does not apply to capital cases as is evident from the separate opinions of the four justices in the *Ritter* case, discussed in the text, above.

If Evans seriously contends that he would have been entitled to a lesser included offense instruction absent the preclusion clause, either because of §13-1-73 or for any other reason, then that contention supports Alabama's position that the court below erred in not certifying to the Alabama Supreme Court Question No. 1(c) in Alabama's certification motion. (A. 68-69) See pp. 42 - 46, *infra*.

included offense instructions which would have been given had the clause not prevented it. The preclusion clause did not operate in Evans' trial and had no effect on the instructions his jury received, because there was no evidentiary basis for any lesser offense instructions. See pp. 4 - 7, *supra*. No judge who has examined the record has ever suggested to the contrary.

In the case of Evans' jointly tried co-defendant, the three Alabama justices who examined the record were convinced that he would not have been entitled to jury instructions on any lesser offense anyway, *Ritter v. State*, *supra*, slip op. at 4 (opinion of Jones, J., joined by Maddox and Adams, J.J.), pp. 5a - 7a, *infra*, and they were convinced of that beyond "[a]ny reasonable doubt." *Id.*, at 6, p. 5a, *infra*. Those Alabama justices found that:

> Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.
>
> The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

Id., at 7-8, p. 6a, *infra*. *Accord, id.*, at 10-11 (separate opinion of Maddox, J.) ("That there was absolutely *no evidence* of Ritter's guilt of a lesser included offense is plain ..."), p. 8a, *infra*. While those conclusions were reached during review of Ritter's conviction, they are equally applicable to Evans. Ritter and Evans were jointly tried, they both pursued the same self-destructive course at trial, the evidence presented against them was materially identical, and each testified in same manner against himself.[18] Thus, the answer to the first inquiry is that Evans, like Ritter, would not have received a lesser offense instruction if the preclusion clause had never existed.

2. Evans' Course of Conduct Was Not Affected by the Preclusion Clause Which Did Not Prevent or Discourage Him from Presenting Any Lesser Offense Evidence

The record shows that Evans' self-destructive legal strategy was not caused by the preclusion clause, because Evans began that strategy before he had any opportunity to know about the clause. Even before his capture, Evans "figured that I would get the electric chair anyway, you know, some place." (A. 20) He had even offered to turn himself in to an F.B.I. agent if the agent could guarantee Evans that he would get the death penalty, something the agent was unable to do. (A. 22) Within hours of his capture in Arkansas, Evans voluntarily confessed his long string of violent crimes, including this robbery-murder, to F.B.I. agents there. (A. 6-7; Tr. 156-158, 167-173) Within four days of his capture, Evans had waived extradition, confessed again to Mobile authorities, and declared that he wanted to be sentenced to death as soon as possible. (Tr. 288-292, 331) There is no evidence that Evans had even heard of the preclusion clause then, nor is there any evidence that his unwavering pursuit of execution thereafter — at arraignment, before the grand jury, and at trial —was

[18]The only difference of note was that the evidence established without dispute that Evans and not Ritter was the actual triggerman (A. 11-12, 38, 41), a distinction which does not favor Evans.

influenced by the clause.

Evans followed the post-arrest course of action that he did for two reasons. One was that such thrasonic behavior was his ticket to instant notoriety and satisfied Evans' perverted desire to bask in what was to him the warm glow of infamy. That is why Evans recounted his crimes at every opportunity. (A. 6-23; 38-42; 288-292)[19]

The second reason or motivation for Evans' behavior was that after his long string of crimes had caught up with him, he simply did not want to spend the rest of his life locked up in prison, or serve a long prison sentence. That is what Evans told the grand jury: "I'm asking to be electrocuted in a, uh, chair, because I can't see spending the rest of my life in a penitentiary, you know, I'm too young for that." (A. 18) That is what the psychiatrist who examined Evans concluded: "He is sincere in seeking the death sentence, preferring extinction to a long prison sentence." (A. 28) And that is what the Alabama Court of Criminal Appeals, after "[a] careful reading of this record," found as a fact: "This Court is convinced that each appellant is sincere in seeking the death penalty, preferring this course to a long prison sentence." *Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977).[20] Under 28 U.S.C. §2254(d), as interpreted in *Sumner v. Mata*, 101 S. Ct. 764 (1981), the state appellate

[19]Evans achieved the first goal of his behavior. Every stage of his prosecution was the subject of massive media coverage. (Tr. 52, 62, 71, 92-93, 95, 255) *See generally, Evans (Betty) v. Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979) ("as the media has advertised"). Not only was Evans the lead story of Alabama newspapers, radio, and television for days, but he also received attention in the national media. *E.g.*, N.Y. Times, Apr. 2, 1979, at A12; *id.*, Apr. 3, 1979, at A17; *id.*, Apr. 5, 1979, at A20; *id.*, Apr. 6, 1979, at A15.

[20]In addition, *see, Evans (Betty) v. Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979) ("it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his bets on a new existence in some other world beyond this."); *see generally*, N.Y. Times, Apr. 5, 1979, at A20 (quoting Evans as stating, "I choose to die because I want to be free . . . I must have my physical freedom. It is an obsession with me. There is a driving force within me that demands I be free. I choose this way.").

court factfinding that Evans' course of action at trial was caused by his desire to avoid a long prison term is presumptively correct. Accordingly, it should be taken as given that Evans' course of action was caused not by the preclusion clause but rather by his own preference for execution instead of a long prison term.[21]

Without disputing that, the two-judge majority below said:

> It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

628 F. 2d at 401 (Pet. App. 20a). That statement misapprehends Alabama's position and disregards the nature of the preclusion clause when viewed against the particular facts in this case. Alabama's position is not just that the evidence at Evans' trial did not justify any lesser offense instructions, but is also that Evans has never proven, or even alleged, that his failure to present lesser offense evidence was caused by the existence of the preclusion clause. And the record actually establishes that it was not. See pp. 25 - 26, above.

The majority below is also wrong because the state through the preclusion clause did not "tell Evans that there is no lesser offense." 628 F. 2d at 401 (Pet. App. 20a). Although the clause did bar the jury from convicting a capital defendant of a lesser included non-capital offense, it did not prevent the defendant from presenting lesser offense evidence and putting forth the defense that he was due to be acquitted of the capital charge because he was guilty of only a lesser offense. That is exactly what defendant Beck did in *Beck v. Alabama*, 447 U.S. at 629-630. Nor did the preclusion clause discourage the presentation of

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[21]Evans' initial preference for execution over lengthy imprisonment is not unique, since three of the four murderers executed in this country since 1967 also made that same choice. *Do Judges Make Death Penalty an Empty Threat?*, U.S. News & World Report, May 11, 1981, at 72.

lesser offense evidence, at least not in the case of Evans and his co-defendant Ritter. In Ritter's appeal, Justice Jones of the Alabama Supreme Court stated that:

> Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Ritter v. State, *supra*, slip op. at 7 (opinion of Jones, J., joined by Maddox and Adams, J.J.), p. 6a, *infra*.[22] What the record proves about Ritter, it also proves about Evans, for the reasons stated on p. 25, *supra*.

Not only did the preclusion clause not restrict or discourage Evans from presenting lesser included offense evidence, but, in fact, *if the preclusion clause had any effect at all on Evans that effect was actually to encourage Evans to present lesser offense evidence.* That is true, because if the preclusion clause had not existed and Evans had attempted to escape a capital conviction by proving himself guilty of the lesser included non-capital offenses applicable to his crime, Evans would have guaranteed himself a very long term in prison — the very thing he wanted to avoid, even to the point of preferring death instead.[23] In view of his over-

[22]The other six members of the Alabama Supreme Court did not disagree with this finding, but instead misinterpreted this Court's *Beck* decision as mandating reversal regardless of the facts. See n. 15 on p. 21, above.

[23]Given the prosecution's evidence against Evans, there is only one lesser included offense strategy that he even conceivably could have attempted. That strategy would have been for Evans to put on some evidence that even though he shot Nassar in the back, he somehow lacked intent to kill which is a necessary element of the *Code of Alabama* 1975,

riding desire to be free or die, it was only because the preclusion clause did exist that Evans had everything to gain and absolutely nothing to lose by attempting to prove that he was guilty of lesser included non-capital offenses rather than the capital offense. By removing the guaranteed minimum cost of a lesser offense strategy — a long prison sentence — the existence of the preclusion clause encouraged a defendant like Evans, who wanted to go free or die, to come forward with lesser offense evidence he otherwise might not have presented. *Cf.*, Tr. Oral Arg., *Beck v. Alabama* (U. S. Oct. Term, 1979, No. 78-6621), at 8 (Blackmun, J., noting that some defendants would prefer to forego lesser offense options in order to increase their chances of outright acquittal).

In summary, although the preclusion clause did operate unconstitutionally when evidence of lesser offenses was presented at trial, it did not prevent the presentation of lesser offense evidence, and whatever effect it may have had on other defendants, the existence of the clause actually acted as an incentive for Evans to present such evidence. The fact that Evans did not respond to the incentive provided by the preclusion clause simply shows that he was so hell-bent on self-destruction that he was not affected by the preclusion clause or by anything else.

The conclusion of the two-judge majority below that Alabama is being fundamentally unfair to Evans is based upon its speculation that the preclusion clause was a "brooding omnipresence" which affected every aspect of Evans' trial, 628 F. 2d at 401 (Pet. App. 19a - 20a), speculation that flies in the face of a record which proves the contrary. Alabama is not being fundamentally unfair to Evans. The Mr. Evans on whose behalf the court below

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§13-11-2(a)(2) capital offense but not of its §13-3-110 robbery component and its §13-1-70 first degree murder (i.e., felony murder) component. *See, Beck v. Alabama*, 447 U.S. at 630 & n. 5. If the preclusion clause had not existed and Evans had tried and somehow succeeded in getting the jury to convict him of the lesser offenses of robbery and murder, he would have received a mandatory life sentence for the murder conviction, *Code of Alabama* 1975, §13-1-74, plus an additional sentence of not less than ten years for the robbery. §13-3-110.

reached that conclusion is the same Mr. Evans who first derived great pleasure from committing several dozen violent crimes, including the brutal murder of the innocent victim in this case, and then took such delight in bragging about his crimes at every available opportunity. What *is* fundamentally unfair is the rule adopted by the court below which conclusively presumes harm and prejudice from nothing more than sheer speculation.

B. Since Evans Was Not Harmed or Prejudiced by the Preclusion Clause, His Conviction Should Not Have Been Set Aside

Because Evans was not harmed or prejudiced in any way by the existence of the preclusion clause, his due process rights were not violated. Alternatively, assuming that the mere existence of the preclusion clause did somehow violate Evans' constitutional rights, his conviction still should not have been set aside, especially not in a habeas corpus proceeding, absent a showing of harm and prejudice.

1. Prejudice is an Essential Component of a Due Process Fundamental Fairness Claim

The Fourteenth Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. *E.g.*, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977); *Donnelly v. De Christoforo*, 416 U.S. 637, 642 (1974). Since a defendant cannot logically be said to have been treated unfairly by something which did not affect him, the requirement of harm and prejudice is inherent in the very concept of due process fundamental fairness. In *Beck v. Washington*, 369 U.S. 541 (1962), the due process claim of a defendant who could not prove that he had been actually prejudiced by the voluminous pretrial publicity about his case was rejected, because:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is

> not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' " United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956). This burden has not been met.

Id., at 558. Likewise, in *Donnelly v. De Christoforo*, 416 U.S. 637 (1974), this Court held that improper prosecutorial remarks to the jury do not violate due process unless the remarks are "sufficiently prejudicial." *Id.*, at 639. Whether the defect be one of omission or commission, faulty jury instructions violate due process fundamental fairness only if they are known to have caused prejudice. The failure to instruct on an essential element of the crime in *Henderson v. Kibbe*, 431 U.S. 145 (1977), did not violate due process because the possibility of prejudice from that omission was, "too speculative to justify the conclusion that constitutional error was committed," *id.*, at 157; and, in *Cupp v. Naughten*, 414 U.S. 141 (1973), this Court ruled that the giving of an instruction that was "undesirable, erroneous, or even 'universally condemned,' " *id.*, at 146, did not violate due process absent actual prejudice. *Id.*, at 147.

Prejudice is a necessary element of a due process claim concerning pre-indictment delay. *United States v. Lovasco*, 431 U.S. 783, 789-790 (1977); *United States v. Marion*, 404 U.S. 307, 325-326 (1971) ("the real possibility of prejudice inherent in any extended delay" is not sufficient, and defendants must "demonstrate actual prejudice"). Prejudice is also a prerequisite of a due process claim involving the suppression of exculpatory evidence, as *United States v. Agurs*, 427 U.S. 97 (1976), makes clear. While *Agurs* phrases this prejudice component in terms of the "materiality" of the suppressed evidence, it notes that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial," 427 U.S. at 104, and it recognizes that the concept of materiality measures the prejudice the defendant suffered because of the suppression. *See*, 427 U.S. at 104 n. 10, 111-112.

Therefore, a denial of due process fundamental fairness in the suppression of evidence context addressed in *Agurs*, as in other areas, is dependent on the existence and extent of prejudice suffered by the defendant.

Recognizing that the record shows that Evans had not been prejudiced by the existence of the preclusion clause, the majority below relied on *Davis v. Alaska*, 415 U.S. 308, 318 (1974), for the proposition that certain constitutional errors are such that no showing of want of prejudice can cure them. 639 F. 2d at 224 (Pet. App. 12a). However, *Davis v. Alaska, supra*, did not even purport to address the prerequisites for a due process fundamental fairness claim, but instead involved a denial of the Sixth Amendment right to confrontation. This Court has recognized that when a state has denied or significantly impaired a benefit specifically guaranteed in the Bill of Rights, a showing of prejudice is not always necessary as it would be if the claim were that due process fundamental fairness had been denied. *Donnelly v. De Christoforo*, 416 U.S. at 643.[24] Since Evans was denied no specific Bill of Rights guarantee, *Davis v. Alaska, supra*, and cases like it are inapposite.[25]

Admittedly, in some circumstances the denial of a specific procedural or substantive right which has been recognized as encompassed within the due process right to fair trial may not require proof of actual prejudice. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510 (1968) (denial of due process right to an impartial jury). Indeed, *Beck v. Alabama*, 447 U.S. 625 (1980), which recognized the due process right to lesser included non-capital offense

[24]Even when a specific Bill of Rights guarantee is involved, a showing of prejudice is sometimes essential to establish infringement. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

[25]The equal protection case of *Rose v. Mitchell*, 443 U.S. 545 (1979), is also inapposite. The ruling there was expressly based on the special concern of the Equal Protection Clause with racial discrimination, *id.*, at 554-555; on the strength of the Court's own commitment to end racial discrimination, *id.*, at 558; and on decades of stare decisis, *id.*, at 554-557; *id.*, at 593-594 (Stevens, J., dissenting in part). None of those factors is present here.

instructions when such instructions are supported by the evidence, is itself an example. But Evans' claim does not fit within the right recognized in *Beck*, because there was no evidentiary basis for a lesser offense instruction in his case, see pp. 22 - 25, *supra*, nor does it fit within any other recognized specific due process right. Instead, it is a due process fundamental fairness claim, and accordingly actual prejudice must be shown, and it must be shown "not as a matter of speculation but as a demonstrable reality." *Beck v. Washington*, 369 U.S. at 558.

2. Even Where There is a Constitutional Violation a Conviction Should Not Be Set Aside Absent Harm

Assuming for purposes of argument that the mere existence of the preclusion clause violated some constitutional right of Evans, his conviction should not have been set aside because the violation, if any, was harmless. This Court has recognized "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 101 S. Ct. 665, 668 (1981), and it has ruled accordingly. *See e.g., id.*, at 667-669 (remedy for violation of right to counsel dependent on extent of harm caused by the infringement); *United States v. Blue*, 384 U.S. 251, 255 (1966) (remedy for violation of Fifth Amendment is exclusion of statement, not barring the prosecution); *Brady v. Maryland*, 373 U.S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sentencing is limited to ordering a new sentence proceeding).

Even where a constitutional violation stems from "the egregious behavior of the governmental agents," no remedy is to be imposed on direct or collateral appeal in the absence of harm. *United States v. Morrison*, 101 S. Ct. at 669.[26] Therefore, even if the existence of the preclusion

[26] In any event, it is undisputed that the preclusion clause stemmed not from any malevolent intent but instead was the result of a good faith but mistaken interpretation of the *Furman v. Georgia*, 408 U.S. 238 (1972), decision. *Beck v. State*, 396 So. 2d 645, 656-657 (1980) (on remand).

clause did violate some constitutional right of Evans, his conviction should not be set aside because he was not actually harmed by it. See pp. 22 - 30, *supra*.

The statement of the majority below, 628 F. 2d at 401 (Pet. App. 19a - 20a), that it could not conclude that being tried under an unconstitutional statute was harmless beyond a reasonable doubt to Evans under *Chapman v. California*, 386 U.S. 18 (1967), should be rejected for three reasons. First, it mischaracterizes the inquiry, because the entire statute was not unconstitutional. *See, Beck v. State*, 396 So. 2d 645 (1980) (on remand). The problem with the statute was that part of it operated unconstitutionally in certain circumstances, but those circumstances were not present in Evans' case. The correct formulation is whether the existence of the preclusion clause was harmless in a case in which it did not operate and had absolutely no effect. The majority below asked the wrong question. Secondly, to the extent that the majority's conclusion could be interpreted to be a factfinding that the preclusion clause harmed Evans, it is plainly erroneous and is flatly contradicted by the record.

Thirdly, the majority's conclusion is not actually a factfinding at all but instead is a supposition based on sheer speculation. The majority supposed that "the offensive statute *would* infect," and speculated that it "*inevitably* influenced," 628 F. 2d at 401 (emphasis added) (Pet. App. 19a -20a), but the majority did not examine the record to test that speculation. The only judges who have done so concluded beyond a reasonable doubt after a "painstaking search" of the entire record that there was not even "the slightest hint" therein that the preclusion clause caused any harm in the joint trial of Evans and his co-defendant. *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), slip op. at 6-7 (opinion of Jones, J., joined by Maddox and Adams, J.J.), pp. 5a - 6a, *infra*, discussed on pp. 25 - 25, *supra*.[27]

[27] A fourth and more fundamental reason that the *Chapman* conclusion of the majority below should be rejected is that it assumes that the existence of the preclusion clause violated Evans' constitutional rights. As explained on pp. 30 - 33, *supra*, since Evans has not shown that the preclusion clause prejudiced him, he has not established that it violated

3. Proof of Harm and Prejudice is Especially Important in Habeas Corpus Proceedings

The burden of proving a constitutional violation is on the petitioner in a habeas corpus proceeding. *E.g., Rose v. Mitchell*, 443 U.S. 545, 564-565 (1979); *Walker v. Johnston*, 312 U.S. 275, 286 (1941); *cf., Swain v. Alabama*, 380 U.S. 202, 226-227 (1965) (certiorari petitioner). Except in the most extraordinary cases, a habeas petitioner must both allege and demonstrate prejudice to obtain the writ. *E.g., Lockett v. Blackburn*, 571 F. 2d 309, 314 (5th Cir.), *cert. denied*, 439 U.S. 873 (1978).[28] Furthermore, because issuance of habeas writs undercuts finality, and "inflicts substantial costs on society, our system of justice and our federal fabric," *Rose v. Mitchell*, 443 U.S. at 579-588 (Powell, J., concurring), a greater showing of prejudice is required to overturn a conviction on habeas than on appeal. *E.g., Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

At the outset of this proceeding, the district court ordered Evans and his attorneys to amend their petition "to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this factual situation" and warned them that any ground not asserted would be presumed waived. (A. 55) Notwithstanding that order, Evans has never even alleged that the preclusion clause prejudiced him (R. 1-8, 52-53), and such allegations would, in any event, run afoul of this Court's admonition that:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is

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his due process right to fundamental fairness. Until such a consitutional violation is established by proof of prejudice, there is no occasion for a *Chapman* analysis. By getting the cart before the horse, the majority below improperly shifted the burden of proof on the harm and prejudice issue to Alabama whereas it should have been on Evans, at least initially, given the fact that he is claiming a denial of fundamental fairness.

[28] *Rose v. Mitchell, supra*, is an exception, but it is distinguishable from the present case for reasons discussed in n. 25 on p. 32, *supra*.

> subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 74 (1977) (citations and footnote omitted). After voluntarily confessing his guilt to the F.B.I. (A. 6-7), to state officers (Tr. 288-292, 331), and to the grand jury (A. 8-23), Evans solemnly declared in open court at arraignment (A. 24) and at trial (A. 33-42) that he was guilty of the capital offense. The court below disregarded those solemn declarations and did so based on nothing more than that court's own contentions — never even pleaded by Evans — which in the face of the record are wholly incredible. In short, it abused the Great Writ.

III.

EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HIS GUILTY PLEA WAIVED THE PRECLUSION CLAUSE ISSUE AND RENDERED THE CLAUSE CONSTITUTIONALLY IRRELEVANT

Another independently adequate reason Evans' conviction should not have been set aside is that he entered a valid guilty plea which waived any defect in the preclusion clause and rendered it constitutionally irrelevant.

A. Evans' Guilty Plea Was Accepted and Under Alabama Law a Guilty Plea Does Have Effect

Evans pleaded guilty at arraignment (A. 24-25; Tr. 48-54), and that plea was accepted and entered in the official minutes of the court. (A. 26, 46) Evans also pleaded guilty at trial via a written motion to plead guilty which was accepted into evidence. (A. 33-37; Tr. 252) *Accord*, *Evans v. State*, 361 So. 2d 654, 655-656, 661 (Ala. Cr. App. 1977); *Evans v. Birtton*,[29] 472 F. Supp. 707, 711-712 n. 2 (S.D. Ala. 1979) (Pet. App. 53a, 119a - 120a). It is undis-

[29]See n. 1 on p. 1, *supra*.

puted that his guilty plea was voluntary and was taken in compliance with *Boykin v. Alabama*, 395 U.S. 238 (1969). *See*, 472 F. Supp. at 711 (Pet. App. 53a - 54a).

Contrary to the conclusion of the majority below, 639 F. 2d at 222-223 (Pet. App. 4a - 8a), the fact that the case against Evans was submitted to a jury does not indicate that his guilty plea was rejected. As the district court explained:

> the conviction was predicated not only on a jury verdict, but also upon a voluntarily made informed guilty plea by the petitioner. Accordingly, the conviction attacked here is not just the result of the jury's deliberations, but additionally is the result of informed conduct on the part of the petitioner. The fact that the matter was subsequently tried to a jury resulted not from a rejection of the guilty plea by the trial court, but rather from Alabama practice of submitting all capital cases to a jury, regardless of what plea is entered. *See Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979). Having pled guilty to the charges, the petitioner is thereby estopped to challenge the validity of the conviction on other than jurisdictional grounds. *See, e.g., Richardson v. Beto*, 472 F. 2d 169 (5th Cir. 1973).

472 F. Supp. at 712 n. 2 (Pet. App. 119a - 120a).[30] Alabama's requirement that capital guilty pleas be submitted to the jury with additional proof serves two purposes. First, by effectively preventing waiver of a jury, it avoids the *United States v. Jackson*, 390 U.S. 570 (1968), problem. *Prothro v. State*, 370 So. 2d 740, 742-747 (Ala. Cr. App. 1979). Secondly, it carries out this Court's *Brady v. United States*, 397 U.S. 742, 758 (1970), command that courts ensure

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[30] Alabama's capital guilty plea procedure, which is a matter of decisional law insofar as the 1975 statute under which Evans was convicted is concerned, *see*, *Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979), is spelled out in Alabama's new 1981 capital punishment statute. *See*, 1981 Alabama Acts, No. 81-178, §4. (The new act applies to offenses committed after July 1, 1981. *Id.*, at §§19, 24.)

themselves that there is a factual basis for guilty pleas.[31]

Under Alabama law, a capital case guilty plea is conclusive on the factual guilt issue when, but only when, the state presents sufficient evidence in addition to the plea for the jury to find the defendant guilty.[32] Once the jury has returned a guilty verdict based on the plea and additional evidence, the issue of factual guilt is conclusively determined, save only that the sufficiency of the evidence to support the verdict may be reviewed on appeal. Any other defects in the factfinding process may not be reviewed, and all non-jurisdictional defects are waived by the guilty plea. *E.g., Ritter v. State*, 375 So. 2d 270 275-276 (Ala. 1979) (guilty plea renders harmless any errors in jury instructions in a capital case), *vacated and remanded*, 448 U.S. 903 (1980), *rev'd*, No. 77-798 (Ala. 1981), *certiorari pending*, No. 81-247 (U.S. filed August 6, 1981); *Graham v. State*, No. 4 Div. 787 (Ala. Cr. App. 1980), slip op at 16 (guilty plea in an Alabama capital case waives any non-jurisdictional defect), *writ quashed as improvidently granted*, No. 79-568 (Ala. 1981).

The majority below's holding that Evans' guilty plea was rejected, 639 F. 2d at 222 (Pet. App. 4a - 8a), flies in the face of the record and misapprehends state law. If the plea had been rejected, it would not have been reflected in the official minutes of the court (A. 26, 46), nor would Evans' motion to plead guilty have been admitted into evidence

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[31]Contrary to the suggestion below, 639 F. 2d at 223 n. 2 (Pet. App. 14a), the Constitution does not forbid Alabama's alteration of guilty plea doctrine in capital cases to require proof of guilt notwithstanding the plea, an alteration favorable to defendants. *See, Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (implicitly approving constitutionality of removing non-jurisdictional defect waiver effect of guilty pleas); *see generally, North Carolina v. Alford*, 400 U.S. 25, 28, 32, 38 (1970) (guilty plea valid despite protestations of innocence where additional evidence of guilt presented).

[32]*Ex parte Sankey*, 364 So. 2d 362, 363 (Ala. 1978), *cert. denied*, 440 U.S. 964 (1979), cited below, 639 F. 2d 223 n. 2 (Pet. App. 14a), is not to the contrary, because it is not a capital case. Alabama's special rule concerning guilty pleas applies only in post-*Furman* capital cases. *See, Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979).

and made part of the record. (A. 33-37; Tr. 252, 285-286) As the district court explained, see p. 37, *supra*, the case went to the jury not because the guilty plea was rejected but because under Alabama law all capital cases are submitted to a jury. Since the Fifth Circuit itself has recognized that a federal district judge's determination of the law of his state is entitled to great weight on review, *Avery v. Maremont Corp.*, 628 F. 2d 441, 446 (5th Cir. 1980), the majority below should have heeded that explanation instead of ignoring it.

The Alabama Supreme Court did say in *Ritter v. State*, 375 So. 2d at 276, that instead of accepting Ritter's guilty plea the trial judge set the matter for presentation to a jury. However, the Alabama Supreme Court also held on that same page of the *Ritter* opinion that his guilty plea rendered harmless and waived a very serious defect in the jury instructions which would otherwise have required reversal. *Id.*, at 276.[33] Therefore, while the guilty pleas of Evans and Ritter were not accepted in lieu of a jury verdict, they were effective to render harmless or waive any non-jurisdictional defects in the proceedings.[34] That is the special Alabama rule in capital cases.

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[33]The defect was the total failure to instruct the jury on the elements of robbery, *id.*, which would have been reversible error had the guilty plea not been effective to waive that omission and render it harmless.

[34]That Alabama appellate courts reviewed various constitutional issues in the case does not mean that Evans' guilty plea did not waive non-jurisdictional defects, because determination of whether there are *any* defects is the necessary first step in determining whether there are any jurisdictional defects. For example, the unconstitutionality of part of a statute is not a jurisdictional defect if that part is severable, *see, Brady v. United States*, 397 U.S. 742 (1970), but unconstitutionality of a part then determined to be non-severable would be a jurisdictional defect since the total invalidity of the statute would bring into question the very power of the state to bring a defendant into court to answer a charge under that statute. *Cf., Blackledge v. Perry*, 417 U.S. 21, 29-30 (1974); *Haynes v. United States*, 390 U.S. 85, 87 n. 2 (1968). Therefore, examination of constitutional claims by the Alabama appellate courts does not mean that those claims were not waived if determined to be non-jurisdictional, but simply that the courts were conducting the first step of what would have been a two-step analysis to determine if there were any jurisdictional defects.

Any doubt about the state law status of Evans' guilty plea supports Alabama's contention that Question No. 1(d) of the certification motion (A. 69) should have been certified to the Alabama Supreme Court. See pp. 42 - 46, *infra*.

B. Evans' Guilty Plea Waived the Preclusion Clause Issue and Rendered the Clause Constitutionally Irrelevant

As *Brady v. United States*, 397 U.S. 742 (1970), establishes, the unconstitutionality of a severable part of a statute under which a defendant pleads guilty is waived by the guilty plea. In *United States v. Jackson*, 390 U.S. 570 (1968), this Court ruled unconstitutional the death penalty provision of the federal kidnapping statute and severed it from the remainder of the statute. *Brady* held that even where a pre-*Jackson* defendant pleaded guilty because of the defect in the statute, *id.*, at 749-750, his plea still operated as a valid waiver of his constitutional rights. The preclusion clause was a severable part of Alabama's capital statute, *Beck v. State*, 396 So. 2d 645, 656-659 (Ala. 1980), and even assuming that the existence of it violated Evans' constitutional rights — which it did not — under *Brady* that violation is a non-jurisdictional defect waived by his guilty plea. *Cf., e.g., McMann v. Richardson*, 397 U.S. 759, 773-774 (1970); *Brickhouse v. Zahradnick*, 553 F. 2d 340, 341-342 (4th Cir.), *cert. denied*, 434 U.S. 938 (1977).

The holding of the majority below that a guilty plea waives only constitutional challenges to proceedings which arise *before* the plea is entered, 639 F. 2d at 223 (Pet. App. 8a - 11a), is wrong. While cases like *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), do establish that one effect of a guilty plea is to waive constitutional defects occurring prior to the plea, this Court has never limited the waiver effect of a guilty plea to antecedent defects. Because the defect involved in *Brady v. United States*, *supra*, concerned the punishment provisions of the statute, it cannot be categorized as a defect antecedent to the plea. *Brady* therefore establishes that severable defects in the statute under

which a defendant is convicted are waived by a guilty plea regardless of whether those defects can be said to be antecedent to the plea.

In addition to its effect as a waiver, Evans' guilty plea also rendered the existence of the preclusion clause constitutionally irrelevant by virtue of the fact that a guilty plea admits all of the elements of the charge. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). This Court, in *Menna v. New York*, 423 U.S. 61 (1975), after reviewing its decisions in *Tollett v. Henderson*, 411 U.S. 258 (1973), *Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), explained that:

> in Tollett we emphasized that waiver was not the basic ingredient of this line of cases, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. . . .

Menna v. New York, 423 U.S. at 62-63, n. 2 (emphasis in original). In this Court's words, Evans' guilty plea "quite validly" removes the issue of factual guilt from this case. Since the sole danger of the preclusion clause was that it increased the risk of an erroneous factual determination of guilt in certain circumstances, *Beck v. Alabama*, 447 U.S. at 637-643, the existence of the clause is rendered irrelevant by Evans' guilty plea which removed the issue of factual guilt from this case.

Therefore, whether the effect of a guilty plea be viewed primarily as waiving non-jurisdictional defects or as rendering irrelevant constitutional violations which do not stand in the way of conviction if factual guilt is determined, the conclusion is the same. Evans' conviction is valid not

only because his constitutional rights were not violated, see pp. 22 - 36, *supra*, but also because he pleaded guilty.

IV.

THE COURT BELOW ERRED IN REFUSING TO CERTIFY THE STATE LAW QUESTIONS INVOLVED IN THIS CASE TO THE ALABAMA SUPREME COURT

Depending to some extent on the contentions that Evans makes in this Court, an alternative ground of error in the judgment below is the failure of the court below to certify certain state law questions to the Alabama Supreme Court.

A. This Case Involves Important State Law Questions Which Should Have Been Certified to the Alabama Supreme Court Before the Federal Issues Were Answered

In *Bellotti v. Baird*, 428 U.S. 132, 147 (1976), this Court established the rule that a federal court should certify state law questions to the appropriate state supreme court whenever answers to such questions "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Accord, e.g., Boehning v. Indiana Employees Ass'n.*, 423 U.S. 6, 7-8 (1975) (abstention correct where state law answers might moot federal issue); *Lake Carriers' Ass'n. v. MacMullen*, 406 U.S. 498, 510-511 (1972) (the "paradigm case" for abstention is where an answer to a state law question might "avoid or modify" the federal issue).

After the decision in *Beck v. Alabama*, 447 U.S. 625 (1980), was issued, Alabama filed a motion requesting the court below to certify seven specified questions of Alabama law to the Alabama Supreme Court. (A. 1, 68-71). Three of those state law questions, raised in the wake of *Beck*,

remain unanswered today.[35] The answer to them, in the words of *Bellotti v. Baird*, *supra*, "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." 428 U.S. at 147.

The first of these questions (Question No. 1(c) at A. 68-69) is whether, in view of the evidence at trial, Evans would have been entitled as a matter of Alabama law to have the jury instructed on any lesser included non-capital offense had it not been for the preclusion clause. The question is important because a negative answer will shape the federal issues by establishing, at least in one important respect, the absence of harm and prejudice. See pp. 22-25 and 30-36, *supra*.[36]

The second state law question which should have been certified (Question No. 1(d) at A. 69) concerns whether Evans' guilty plea at arraignment and at trial is valid and effective under Alabama law. Because guilty pleas which have state law validity and effect operate as a matter of federal law to waive and render irrelevant certain constitutional claims, see pp. 40 - 41, *supra*, the answer to this question will certainly shape the federal issues and could materially alter them. The need for certification to answer this particular question of Alabama law is highlighted by the fact that the district court and the court of appeals majority answered it in contrary ways. See pp. 37 - 39, *supra*. Only the Alabama Supreme Court can authoritatively settle which federal court answered this important state question correctly, because only the Alabama

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[35]State law Question Nos. 1(a) and (b) were answered by the Alabama Supreme Court's later decision in *Beck v. State*, 396 So. 2d 645 (1980) (on remand). Question Nos. 1(f) and (g) related to federal issues which it turned out were not addressed by the court below.

[36]The necessity for certifying this particular question depends on whether Evans contends that had the preclusion clause not existed he would have received a lesser offense instruction despite the absence of any evidentiary basis for it. See pp. 22 - 25, *supra*. If Evans concedes that Alabama law does not provide for any lesser included non-capital offense instructions when the evidence is as it was at his trial, then state law Question No. 1(c) is not in dispute and need not be certified.

Supreme Court can speak with final authority on a question of Alabama law. *E.g., Alabama v. King & Boozer*, 314 U.S. 1, 9-10 (1941).[37]

The third question which should have been certified (Question No. 1(e) at A. 69) is whether, in view of the *Beck* decision, Evans is now entitled to have his conviction or sentence reversed as a matter of Alabama law. Petitioners' position is that Evans is not entitled to a new trial as a matter of state law, but to the extent that Evans contends otherwise, that question which has never been answered, might moot the federal issues addressed by the court below.[38]

B. The Rule Adopted By the Court Below Stands the Law of Certification on its Head

The certification motion Petitioners filed in the court below stated that there were no clear, controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions; that resolution of the questions would avoid in whole or part the federal constitutional issues in this case, or at least substantially modify them; and that answers to the state law questions should come

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[37]Evans' guilty plea is an independently adequate alternative reason why his conviction should not have been set aside. See pp. 36 - 42, *supra*. If this Court agrees with Petitioners' primary contention that Evans' constitutional rights were not violated in any event, see pp. 22 - 36, *supra*, then it does not matter what effect the guilty plea had on his constitutional claims.

[38]The decision in *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), pp. 1a - 9a, *infra*, is based on federal grounds rather than state law grounds. *See, id.*, slip op. at 2 ("We believe this result is compelled by the decision of the Supreme Court of the United States in *Beck* and is consistent with the interpretation of that decision reached by the Court of the Appeals for the Fifth Circuit . . .") (majority opinion), p. 1a, *infra; id.*, slip op. at 10 (". . . it is obvious that this Court, which had affirmed Ritter's conviction [*Ritter v. State*, 375 So. 2d 270 (1979)] now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in *Beck*.") (Maddox, J., concurring specially), p. 8a, *infra*.

The Alabama Supreme Court misinterpreted this Court's *Beck* decision in the *Ritter* case. See pp. 14 - 22, *supra*.

from the Alabama Supreme Court because those answers would vitally affect the public policy of Alabama. (A. 69-70) The motion also stated that Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. (A. 70)[39]

Without taking issue with any of the grounds of the certification motion, the court below, with one judge dissenting, 628 F. 2d at 401-402 (Thomas, J., dissenting) (Pet. App. 22a), refused to certify any of the seven specified state law questions to the Alabama Supreme Court. *Id.*, at 401 (majority opinion) (Pet. App. 21a).[40] The majority held, as Evans had urged it to, that since it concluded that Evans was entitled to a new trial as a federal constitutional matter, "certification would be nothing more than an empty academic exercise." *Id.*

Under the rule adopted by the majority below, state law questions are not to be certified if answers to the federal constitutional issues will make the state questions moot. This rule stands the law of abstention-certification on its head. The purpose of abstention-certification is not to avoid or define state law questions by answering federal

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[39]The Alabama Constitution of 1901, Article VI, §140(b)(3), as amended by Amendment No. 328, authorizes the Alabama Supreme Court to answer state law questions certified to it by federal courts, and Alabama Rule of Appellate Procedure 18 (reproduced in Pet. App. 30a-33a) provides the procedure for answering such questions.

The adequacy of Alabama's certification procedure is undisputed, and the Fifth Circuit has twice praised it. *See, Tyler v. Insurance Co. of North America*, 520 F. 2d 341 (5th Cir. 1975) ("the valuable tool provided by the certification provision of the Alabama Constitution"); *Barnes v. Atlantic & Pacific Life Ins. Co.*, 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama now has are invaluable tools of cooperative judicial federalism").

[40]Inexplicably, in discussing the certification issue, both the majority and the dissent referred only to specified state law Question No. 1(a), which concerned the severability of the preclusion clause, and ignored the other specified state law questions which Alabama requested the court to certify. 628 F. 2d at 401 (majority opinion) (Pet. App. 17a); *Id.*, at 401-402 (dissenting opinion) (Pet. App. 22a). The decision in *Beck v. State*, 396 So. 2d 645 (Ala. 1980) (on remand), has answered the severability question, but three other specified state law questions which the court below refused to certify remain unanswered. See pp. 43-44, *supra*.

constitutional issues, but just the opposite. The majority below has the rule backwards — the idea is to make federal issues "an empty academic exercise," not the state law questions. By reversing the standard set out by this Court in *Bellotti v. Baird*, 428 U.S. 132 (1976), the majority below has adopted a rule which threatens the utility of abstention-certification and endangers the important policies behind it. This Court has said that abstention-certification "minimize[s] federal-state friction" and "avoids premature and perhaps unnecessary [federal] adjudication," *Kusper v. Pontikes*, 414 U.S. 51, 54-55 (1973), and "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974); *accord, Barnes v. Atlantic and Pacific Life Ins. Co.*, 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama has now are invaluable tools of cooperative judicial federalism.").

The majority below has taken the cooperation out of "cooperative judicial federalism." By ruling that federal courts should push aside important and possibly dispositive state law issues and grab any opportunity to exercise federal judicial power, it has made the exercise of federal judicial power an end in itself. This Court should not put its imprimatur on that notion.

C. This Court Itself Should Certify the State Law Questions to the Alabama Supreme Court

If this Court concludes that the three state law questions discussed on pp. 43 - 44, *supra*, should be answered by the Alabama Supreme Court before the federal issues are addressed, then instead of remanding the case to the court below with directions for that court to certify the questions, this Court itself should certify them. *See, Elkins v. Moreno*, 435 U.S. 647 (1978); *Massachusetts v. Feeney*, 429 U.S. 66 (1976); *Dresner v. Tallahassee*, 375 U.S. 136 (1963). After receiving the state law answers from the Alabama Supreme Court, this Court can then address the federal issues shaped by those answers.

CONCLUSION

This Court should reverse the judgment of the court of appeals which ordered that the writ of habeas corpus issue. In the alternative, this Court should certify the state law questions discussed on pp. 43 - 44, *supra*, to the Alabama Supreme Court before addressing the federal issues presented in this case.

Respectfully submitted,

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Dated: September 5, 1981

Appendix A

June 12, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798 IN THE MATTER OF:

Wayne Eugene Ritter

v.

State of Alabama

After Remand by the United States Supreme Court

On Application for Rehearing

SHORES, JUSTICE.

The application for rehearing is denied. The opinion of the Court dated May 8, 1981 is extended so that the opinion shall read as follows:

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of *Beck v. Alabama*, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

We believe this result is compelled by the decision of the Supreme Court of the United States in *Beck* and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in *Evans v. Britton*, ___ F.2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

REVERSED AND REMANDED; APPLICATION FOR REHEARING DENIED; OPINION EXTENDED.

Faulkner, Almon, Embry, and Beatty, JJ., concur in decision and in denial of rehearing.

Torbert, C. J., concurs specially in decision, with opinion, and concurs in denial of rehearing.

Jones, J., with whom Maddox and Adams, JJ., concur, concurs in part and dissents in part in decision, with opinion.

Maddox, J., with whom Jones and Adams, JJ., concur, concurs specially in denial of rehearing, with opinion.

TORBERT, CHIEF JUSTICE (Concurring specially).

Although I agree with the result reached by the majority, I do not wish to be understood as being in favor of abolishing or otherwise modifying the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser included offense. *See, Roberts v. Louisiana*, 428 U.S. 325 (1976).

JONES, JUSTICE (Concurring in part and dissenting in part in decision):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-*Beck* death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of *Beck v. Alabama*, ___ U. S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in *Beck*, the evidence is susceptible of a finding of such an offense. Here, as in *Beck*,

the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike *Beck*, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to *Beck* on remand [MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, *did* include the "preclusion" clause, the operative effect of which *may* have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the

> trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in *Beck* does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read *Beck* as suggesting that a pre-*Beck* capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of *Beck*.

While the State, in my opinion, has interpreted *Beck* far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpreta-

tion.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read *Beck*, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-*Beck* capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such a hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

---

[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradiction to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have

been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in *Beck* after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-*Beck* jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's *Beck* mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by *Beck* after remand.[3]

Maddox and Adams, JJ., concur

---

[2]See *Brady v. United States*, 397 U. S. 742 (1970).

[3]See *Brady v. Maryland*, 373 U. S. 84 (1963); *Parker v. North Carolina*, 397 U. S. 790 (1970).

IN THE MATTER OF: Wayne Eugene Ritter v. State

MADDOX, JUSTICE (Concurring specially in denial of rehearing).

I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in *Beck v. Alabama*, ___ U. S. ___ (1980). This Court considered Ritter's case, in light of *Beck*, only because the case was remanded here at the request of the Attorney General. In brief, the Attorney General sets out the facts:

> On June 20, 1980, the United States Supreme Court issued its decision in *Beck v. Alabama*, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). On June 23, 1980, the State filed a letter in the United States Supreme Court arguing that Ritter's case was distinguishable from Beck, because there was no evidentiary basis for a lesser included offense in Ritter's case. In view of that difference, the letter requested that the Court remand Ritter's case to the Alabama Supreme Court for reconsideration in light of *Beck*, rather than reversing it on authority of *Beck*.

In view of the above, it is obvious that this Court, which had affirmed Ritter's conviction [*Ritter v. State*, 375 So. 2d 270 (1979)], now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in *Beck*. Obviously, I do not believe that Ritter is in the same situation as Beck was; therefore, I joined with Mr. Justice Jones in his dissenting views which he expressed on original delivery.

I still adhere to my original view that under the facts of this case, Ritter is not entitled to a new trial to determine his guilt or innocence of the capital offense. He is only entitled to a sentencing hearing before a jury. That there was absolutely *no evidence* of Ritter's guilt of a lesser included offense is plain, and had an instruction on lesser

included offenses been given in this case, the principle announced in *Roberts v. Louisiana*, 428 U. S. 325 (1976), would be applicable. There, the Supreme Court of the United States held that the Louisiana death penalty scheme which required juries in all first degree murder cases to also be instructed on manslaughter and second degree murder even if there was not a scintilla of evidence to support such a verdict was unconstitutional.

I think a majority of this Court has misread *Beck* to require a new trial in a case like Ritter's where the record of trial affirmatively precludes any possibility that the defendant could have adduced any evidentiary support for a lesser included offense. My difference with the majority in this point aside, however, I agree with the majority's basis for its extension of the opinion on rehearing.

I would also add one additional point on which there is no disagreement among the members of the Court: The order of remand by the Court of Criminal Appeals, as mandated by this Court, is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this case.

Jones and Adams, JJ., concur.

Appendix B

May 8, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798 Ex parte Wayne Eugene Ritter

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of *Beck v. Alabama*, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and *Beck v. State* [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and

sentence and remand the case for a new trial, has mandated that all pre-*Beck* death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of *Beck v. Alabama*, ___ U. S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in *Beck*, the evidence is susceptible of a finding of such an offense. Here, as in *Beck*, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike *Beck*, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to *Beck* on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which *may* have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction

(thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in *Beck* does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read *Beck* as suggesting that a pre-*Beck* capital defendant was required to so posture his trail strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of *Beck*.

While the State, in my opinion, has interpreted *Beck* far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read *Beck*, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-*Beck* capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively

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[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent

defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in *Beck* after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-*Beck* jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's *Beck* mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by *Beck* after remand.[3]

Maddox and Adams, JJ., concur.

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[2]See *Brady v. United States*, 397 U. S. 742 (1970).

[3]See *Brady v. Maryland*, 373 U. S. 84 (1963); *Parker v. North Carolina*, 397 U. S. 790 (1970).

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No. 80-1714

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner,
Alabama Department of Corrections and
JAMES D. WHITE, Warden, Holman Prison,
Petitioners,

v.

JOHN LOUIS EVANS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Does *Beck* v. *Alabama*, 447 U.S. 625 (1980), require the reversal of all Alabama pre-*Beck* capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of *Bellotti* v. *Baird*, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court's denial of the petition for writ of habeas corpus is reported as *Evans* v. *Britton*, 628 F.2d 400 (5th Cir. 1981) and appears in the appendix to the petition for writ of certiorari at 15a-22a. The extension of the opinion of the Court of Appeals on petition for rehearing is reported as *Evans* v. *Britton*, 639 F.2d 221 (5th Cir. 1981) and appears in the appendix to the petition for writ of certiorari at 3a-14a. The opinion of the District Court is reported as *Evans* v. *Britton*,[1] 472 F.Supp. 707 (S.D. Ala. 1979) and appears in the appendix to the petition for writ of certiorari at 46a-128a.

JURISDICTION

The jurisdiction of this court rests upon 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 15, 1980. An extended opinion was filed on March 8, 1981. Petitioners filed a timely petition for certiorari which this Court granted on June 22, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted";

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

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[1] The caption of the District Court opinion misspells the name of Robert Britton who was them Commissioner of the Alabama Department of Corrections.

This case also involves the following statute of the State of Alabama

Title 13, CODE OF ALABAMA (1975)

CHAPTER II

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

§ 13-11-1. Limitation On Imposition Of Death Penalty Or Life Sentence Without Parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty shall be fixed as punishment only in cases and in the manner herein enumerated and described in 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975), No. 213, § 1.)

§ 13-11-2. Aggravated Offenses For Which Death Penalty To Be Imposed; Felony-Murder Doctrine Not To Be Used To Supply Intent; Discharge Of Defendant Upon Finding Of Not Guilty; Mistrials; Reindictment After Mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

* * *

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

* * *

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearings As To Imposition Of Death Penalty Or Life Sentence Without Parole After Conviction; Admissibility Of Evidence; Right Of State And Defendants To Present Arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any of such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the

United States or of the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination Of Sentence By Court; Court Not Bound By Punishment Fixed By Jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating or mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction And Sentence Of Death Subject To Automatic Review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

§ 13-11-6. Aggravating Circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating Circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment Of Experienced Counsel For Indigent Defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court-appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. Effective Date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

STATEMENT OF THE CASE

1. Pre-Trial Proceedings

John Louis Evans was tried in the Circuit Court of Mobile County for the robbery and intentional murder of Edward Nassar. After his arrest in Little Rock, Arkansas, and return to Mobile, Evans testified before the Mobile County Grand Jury concerning the killing of Mr. Nassar.

Although he freely admitted his participation in the robbery it is clear from his own testimony that he did not enter the victim's pawn shop intending to kill anybody (Tr. 335, J.A. 21).[2]

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[2] Consistent with the state's denomination, references to "Tr." are to the two volume state court trial transcript. References to "R" are to the record on appeal. References to J.A. are to the Joint Appendix prepared for this court. References to "Pet. App." are to the Appendix to the certiorari petition.

Q: Well, have you ever thought of just going out and getting a job, a decent job?

A: Oh, I've done that, sure.

Q: And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?

A: Well, uh, I don't know. Uh, it's kinda like an inner drive, I guess, you know, it's something that I always, huh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, *you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know*. (Emphasis added).

Further, his testimony indicates that his shooting of the victim was an instinctive reaction for self-preservation.

Evans testified as follows (Tr. 325; J.A. 12):

Q: It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?

A: Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.

Wayne Ritter, Evans' co-defendant testified to the same effect (Tr. 340):

Q: Had you discussed what you were going to do when you go in the s-store?

A: Yeah. John had a pistol and we decided not to take the sawed-off rifle in because it was too big. And I had, uh, some .38 shells. And I was going to ask to see a pistol then John was going to draw his; I would load mine. And we were going to take some guns and the money in the cash register and leave. Uh, but when John, uh, drew his pistol, Nassar dropped down and

started crawling toward the office area. And he reached up, like he was going for a gun and that's when he was shot.

Evans further testified (Tr. 33-334, J.A. 19):

Q: And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?

A: I didn't take time to think abou it. Uh, . . .

Q: You were going to shoot him [Nassar] if he made that move [for his gun]?

A: I was going to shoot him if he reached for a-a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's — that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well that's — *that's pure instinct. That's self-preservation.* I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have — if — it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick.

Following his testimony and that of his co-defendant, the grand jury returned indictments against both. At arraignment, Evans plead guilty, but the trial judge, correctly interpreting the requirements of Alabama law, set the matter of Evans' guilt for "submission to a jury" eight days later. (Tr. 68).

2. Trial Proceedings

Evans' trial proceeded in exactly the same fashion as every other trial. The judge conducted voir dire of the jury and stated:

the only jurors that I can have sitting in the trial of this case are jurors who can give me their assurance, individually under oath, that they will not allow anything to influence their verdict in this case in this courtroom. You have to give me your assurance, under oath that if you have read or

> heard anything about the case you are capable of putting that out of your mind, and reaching a verdict on the evidence presented in this courtroom.

(J.A. 29).

Following jury selection wherein both sides utilized their peremptory challenges, (Tr. 89-93), the Rule of Sequestration was invoked and both the state and defense made opening statements. (J.A. 31-32). After the presentation of the state's evidence, Evans testified. He told the jury "I would rather die by electrocution than to spend the rest of my life in the penitentiary." (J.A. 38).[3]

Following the arguments the judge charged the jury on the elements of the crime and the standard of proof beyond a reasonable doubt. (J.A. 44-45). He included the admonition, "I can only tell you that in reaching your verdict, you may not take the simple approach and go no further and say, if the defendant admits he did it, we go no further." (J.A. 44).

The jury returned a verdict of guilt which carried with it a mandatory sentence of death. (Tr. 227). The next day, the trial judge held a sentencing hearing wherein he accepted the sentence of death as fixed by the jury. (Tr. 241).[4]

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[3] Because of the existence of the preclusion clause the only two realistic possibilities for Evans' sentence were death or life imprisonment *without* the possibility of parole. Had the preclusion clause not existed, the jury could have found Evans guilty of felony murder, which is first degree murder under Code of Alabama 1975, § 13-1-70 and is punishable by life imprisonment *with* the possibility of parole. All killings during the commissions of felonies are not capital crimes under Alabama law, and simple felony murder is not a capital offense. *Ritter* v. *State*, 375 So.2d 270 (Ala. 1978).

[4] The conviction and death sentence of respondent's co-defendant Ritter were originally reversed in *Ritter* v. *State*, No. 77-798 (Ala. May 8, 1981) (on remand) *extended on rehearing, id.* (Ala. June 12, 1981). That decision was vacated and remanded by this court on October 13, 1981, "for further consideration in light of *Reed* v. *State*, ____ So.2d ____ (Ala. 1981),

3. State Appellate Court Proceedings.

Evans' conviction and sentence wwere affirmed by the Alabama Court of Criminal Appeals in *Evans* v. *State*, 361 So.2d 654 (Ala. Cr. App. 1977) and by the Alabama Supreme Court in *Evans* v. *State*, 361 So.2d 666 (Ala. 1978). This court denied certiorari in *Evans* v. *Alabama*, 440 U.S. 930 (1979).

4. The Federal District Court

Evans filed a petition for federal writ of habeas corpus alleging *inter alia* that the Alabama death penalty law under which he was tried and sentenced violated the Eighth and Fourteenth Amendments (R. 3-4). He specifically alleged that the existence of the portion of the Alabama law which precluded juries from considering evidentially supported lesser included offenses violated his right to due process of law. [5] On June 12, 1979, the District Court denied relief and Evans appealed.

5. The Court of Appeals

In his presentation to the Court of Appeals, Evans attacked the constitutionality of the Alabama death penalty statute on several fronts. He challenged not only the preclusion clause but also raised various issues concerning lack of jury sentencing,

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Alabama v. *Ritter*, ___ U.S. ___, (81-247). On December 11, 1981, the Alabama Supreme Court, on remand, issued an opinion reversing Ritter's conviction on federal constitutional grounds. *Ritter* v. *State*, No. 77-798 (Ala., December 11, 1981) Slip. Op. p. 2. Three justices dissented from that holding, but even they believed that Ritter was entitled to a new trial on the "issue of sentencing." *Id.* p. 3.

[5] The preclusion clause originally appeared at Code of Alabama, 1975 § 13-11-2(a). Following this court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), on remand, the Alabama Supreme Court judicially recreated the Alabama death penalty law so as to permit trial juries to consider evidentially supported lesser included offenses and to give the trial jury sentencing authority. *See Beck* v. *State*, 396 So.2d 645 (Ala. 1980).

appellate review and the overall operation of the statute. During the pendency of the appeal, this court issued its opinion in *Beck* v. *Alabama*, 447 U.S. 625 (1980). After requesting supplemental briefs on the impact of the *Beck* decision on this case, the Fifth Circuit reversed the District Court in a decision styled *Evans* v. *Britton*, 628 F.2d 400 (5th Cir. 1980) (Pet. App. 15a-22a). The court, drawing on this Court's *Beck* opinion, found that the constitutional violation could not be harmless error because "the peculiar nature of the offensive statute would infect virtually every aspect of any capital defendant's trial from beginning to end." 628 F.2d at 401.

The court also declined to certify certain questions of law to the state courts as the state had requested, since "as to Evans, certification would be an empty exercise." *Id.*

In response to a petition for rehearing with a suggestion for rehearing en banc filed by the state, the Fifth Circuit extended its opinion. *Evans* v. *Britton* 639 F.2d 221 (5th Cir. 1981). (Pet. app. 3A-12A). In its extended opinion, the court rejected the state's contention that Evans' attempted plea of guilty barred his constitutional challenge to the statute.

It also found, based on this court's opinion in *Beck* that no showing of prejudice would be required for reversal. Because the court reversed Evans' conviction and death sentence on grounds relating to the preclusion clause, it did not reach the other constitutional issues presented by him on appeal. [6]

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[6] The issues presented to the Fifth Circuit on appeal are as follows:

1. Whether Alabama's unique statutory prohibition which precludes juries in capital cases from considering factually established lesser included offenses, deprives all persons accused of capital crimes of the due process and equal protection rights guaranteed them by the Fourteenth Amendment and violates the cruel and unusual punishment prohibition of the Eighth Amendment.

2. Whether the role Alabama has assigned the jury of compelling it to impose a death sentence upon every defendant convicted of a capital crime

SUMMARY OF ARGUMENT

In its decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), this court held that the Alabama death penalty law was unconstitutional because it prevented a jury in a capital case from considering evidentially supported lesser included offenses. The Court also found that two other constitutional defects inhered in the Alabama statute: (1) the interference with the neutral fact-finding worked by the seemingly mandatory death sentence, 447 U.S. at 640 and (2), the "manifest . . . tendency (of the jury's verdict) to motivate the judge to impose the same sentence as the jury did." 447 U.S. at 645. The State contends that Evans was not injured by the preclusion clause. Even assuming the state's contention that the preclusion clause had no effect on Evans is correct, he still suffered injury at the hands of the other constitutional defects identified by this court.

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while precluding it from considering mitigating circumstances violates the Eighth and Fourteenth Amendments.

3. Whether Alabama's procedure of deferring the trial judge's consideration of aggravating and mitigating circumstances until after the jury has mandatorily imposed a sentence of death infringes a capital defendant's right to unprejudiced sentencing in violation of the Eighth and Fourteenth Amendments.

4. Whether Alabama's failure to require that aggravating circumstances be proved beyond a reasonable doubt violates the Fourteenth Amendment's Due Process Clause.

5. Whether Alabama's failure to provide a system of comparative reveiw of sentences and to empower its appellate courts to vacate death sentences in appropriate cases renders its death penalty statute violative of the Eighth Amendment.

6. Whether the overall operation of Alabama's death penalty statute is so prejudicial to the rights of a capital defendant at both the guilt and sentencing stages that it violates both the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment.

Evans, like Beck, was convicted by a jury which may have been impermissibly affected by the apparently mandatory nature of its verdict form. He was also sentenced by a judge who reached his sentencing decision only after the jury verdict of death was announced and who was required to give weight to the "fixing of the punishment at death by the jury." Thus, even if Evans was not harmed by the preclusion clause, his case was clearly prejudiced by the application of the other unconstitutional provisions identified and criticized by this court in *Beck*.

With regard to the preclusion clause, however, it is apparent that Evans was prejudiced both presumptively and actually by its operation. Although the state attempts to pigeonhole the constitutional violation caused by the preclusion clause into the "fundamental fairness" standard, it does not fit. The violation is not a fundamental fairness type but is, as this court's opinion in *Beck* makes clear, a violation of the Eighth Amendment. In Eighth Amendment cases no showing of harm or prejudice is required to establish the constitutional violation.

Moreover, because the violation implicates the Eighth Amendment, no showing of harm or prejudice is required for reversal. In none of its most recent death penalty opinions nor in any of the hundreds of cases in which the death sentence was vacated in the wake of *Furman* v. *Georgia*, 408 U.S. 845 (1972) did this court examine whether a particular petitioner before it has been harmed.

In addition, this case fits squarely within this court's decisions which have not required a showing of harm or prejudice as a pre-requisite to reversal where a constitutional error infected the entire trial process and thus the content of the record. In those cases, because a precise evaluation of prejudice is impossible, no showing of harm or prejudice is required. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

Even if prejudice is not presumed to flow from the preclusion clause, the state has not met its burden of proving that the error worked by the preclusion clause was harmless beyond a reasonable doubt. The state makes a two-pronged argument that Evans was not harmed based on its own amateur psychological evaluation of how Evans would have proceeded had the preclusion clause not existed. Their argument hardly amounts to proof beyond a reasonable doubt. Evans' choice at trial was death over life imprisonment without parole. Had the constitutionally required possibility of conviction of a lesser included offense attended by a lesser penalty existed — such as that of first degree murder with its attendant punishment of life imprisonment with the possibility of parole after 10 years, Evans may well have made a very different choice as to how to proceed.

Additionally, the record in this case, incomplete though it is, demonstrates that Evans was harmed by the preclusion provision. Evans' testimony before the Grand Jury raises a significant question concerning Evans' intent to kill the victim. Had that evidence been developed by competent counsel and presented at trial, it clearly would have warranted an instruction on the lesser offense of first degree murder had the preclusion clause not been in effect.

The state continues to try to argue around the effect on Evans of the unconstitutional Alabama death penalty law by arguing that Evans' attempted plea of guilty waives his constitutional challenges. Under Alabama law, his plea had no effect because in capital cases a jury must determine guilt and sentence. *Prothro* v. *State*, 370 So.2d 740 (Ala. Cr. App. 1979). As Alabama law requires, Evans was tried before a jury in precisely the same manner as he would have been had he pleaded not guilty.

There are also two reasons why, as a matter of federal law, Evans' plea did not waive federal habeas review of his constitutional challenges. First, "although termed a 'guilty plea' . . .

[Evans] plea had legal consequences quite different from the consequences of the pleas entered in the traditional guilty-plea cases." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 (1975). Second, the constitutional deprivations of which Evans complains — the faulty fact-finding process at his trial and the institutionalized bias for death at his sentencing are deprivations that occurred *after* Evans pleaded. Both *Lefkowitz, supra.* and *Tollett* v. *Henderson*, 411 U.S. 258 (1973) make clear that such claims are not waived or forfeited under federal law.

Lastly, settled authority compels the conclusion that the court below properly refused to certify state law questions concerning the existence of lesser included offenses in the trial record and the effect of Evans plea. Certification is proper only where there exists an "uncertain issue of state law" *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971). The issues sought to be certified are not uncertain, but rather quite settled. Federal courts are obviously as competent as state courts to apply settled state law to the facts of a particular case. Further, the state's request for certification was a blatant attempt at forum manipulation. The state specifically waived all exhaustion requirements below, yet before this court complains of the damage the decision below wreaked on federalism. The state's action in this case shows that the state's interest is not in maintaining the proper relationship between state and federal courts, but rather in seeking whatever forum it believes to be most favorable at a given time.

Evans is entitled to have his conviction reversed and his death sentence vacated, and the decision below should be affirmed.

I. THIS COURT'S DECISION IN BECK V. ALABAMA CONTROLS THIS CASE.

The state argues that Evans' conviction and sentence of death under the now defunct [7] Alabama capital punishment statute can stand because Evans, unlike Beck, failed to present any evidence at trial that could have justified a conviction of a lesser included offense. Because of this failure, the state reasons, Evans cannot demonstrate that he was harmed by the statute's unconstitutional provision precluding jury consideration of lesser included offenses. We demonstrate at pp. 20-23, *infra* that the distorting effect of the preclusion clause on record in this case is such that a precise determination of the nature and degree of harm suffered by Evans because of it is impossible, rendering reversal of his conviction necessary. We further show that even the imperfect record that does exist in Evans' case plainly reveals that he was harmed by the application of the preclusion clause to his case. Yet even assuming that the state's contention that the preclusion clause had absolutely no effect on Evans' case is correct, the state's differentiation of this case from *Beck* solely on the grounds that Evans presented no evidence of a lesser included offense at trial necessarily sweeps aside the effect on Evans' case of two constitutional defects other than preclusion provision that this Court in *Beck* found inhered in the Alabama statute: (1) the interference with neutral fact finding worked by the seemingly mandatory death sentence, 447 U.S. at 640, and (2) the "manifest . . . tendency (of the jury's verdict) to motivate the judge to impose the same sentence that the jury did." 447 U.S. at 645, in contravention of the judge's duty impartially to weigh aggravating and mitigating circumstances. [8]

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[7] In its decision on remand of *Beck* from this Court, the Alabama Supreme Court substantially revised Alabama's death penalty statute and the procedures pursuant to which a capital defendant can be sentenced to death. *Beck* v. *State*, 396 So.2d 645 (Ala. 1981).

[8] Both of these defects were challenged by Evans in the District Court and in the Court of Appeals.

Evans suffered no less than Beck did from these defects. With respect to the first — the mandatory nature of the jury verdict form — the state argues that Evans should not be heard to complain since, at most, it encouraged the jury improperly to acquit him. This, of course, was equally true of the verdict form in Beck's case. The state simply misapprehends the problem with a mandatory or apparently mandatory death penalty. The problem is not primarily that such a provision motivates improper acquittals, but rather that it "makes the guilt demonstration depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue," *Beck* v. *Alabama, supra,* 447 U.S. at 640. The possibility that the mandatory verdict form might benefit a particular defendant in a particular case is subsidiary to the fact that "in every case" in which it is required, it "introduce[s] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Id.* at 643. The mandatory jury verdict of death was required in Evans' case just as it was required in Beck's (Tr. 224, 227; J.A. 44). Thus, no less than in Beck's case, the jury's determination of Evans' guilt may have been impermissibly infected by its unguided "feelings as to whether or not [Evans] deserves the death penalty." *Id.* at 640.

Just as there is no difference between Evans' case and Beck's in the way in which the mandatory verdict form infected the jury's guilt determination, there is no difference between their cases in the improper pressures brought to bear on the sentencing judge as a result of the mandatory verdict form. As did the sentencing judge in *Beck,* the sentencing judge in Evans' case came to the sentencing proceeding — a proceeding this court has held to be a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina,* 428 U.S. 280, 304 (1976) (Joint Opinion) — only after the jury's verdict sentencing Evans to die, rendered without any consideration of mitigating circumstances, had been

publicly pronounced and publicized. In performing the constitutionally required task of weighing aggravating and mitigating circumstances, Evans' sentencing judge, like Beck's, labored not only under these practical obstacles to treating the jury's imposition of the death penalty as being purely advisory," 447 U.S. at 645 n. 22, but also under the impermissible statutory obligation to give weight to "the fixing of the punishment at death by the jury." Code of Alabama, (1975) § 13-11-4.

In sum, the state hinges the applicability of this Court's decision in *Beck* to the facts of this case completely upon the effect that the unconstitutional preclusion clause had on Evans' case. The preclusion clause, however, is only one of several defects this Court found in the capital statute under which Beck and Evans were prosecuted, convicted and sentenced to die. Even if Evans was not harmed by the preclusion clause — and we demonstrate *infra* pp. 26-29 that he was — his case was clearly prejudiced by the application of the other unconstitutional provisions identified and criticized by this Court in *Beck*.

II. EVANS WAS BOTH PRESUMPTIVELY AND ACTUALLY PREJUDICED BY THE PRECLUSION CLAUSE

A. The Constitutional Violation In This Case Does Not Arise Under Fundamental Fairness Principles Of The Due Process Clause And Thus No Showing Of Harm Or Prejudice Is Required To Establish It.

It is necessary at the outset to clarify certain principles concerning constitutional error on which the state has purportedly relied in urging reversal. Since the state's argument on these principles confuses and commingles the concepts of prejudice and harm, we feel compelled to set forth those principles and show how they apply to the case *sub judice*.[9]

[9] There is no suggestion that the claims asserted by Evans were raised in untimely fashion and are thereby subject to waiver or procedural default. Thus any requirement that a habeas petitioner establish cause and prejudice in the face of waiver or procedural default, *see Wainwright* v. *Sykes*, 433 U.S. 72 (1977) is not implicated here.

This court has previously held that in certain cases involving trial error, a Fourteenth Amendment Due Process violation arises only when the error complained of "so infects the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). In those cases, reversal is required only when the "fundamental fairness" of the trial is affected. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974). Through these cases, the Court seems to suggest that harm must be demonstrated as a pre-requisite to the finding of a due process violation. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). The state tries to pigeonhole this case into that doctrine. It does not fit.

1. The constitutional violation in this case is an eighth amendment violation

Evans was tried, convicted and sentenced to death under the same statute which was declared invalid in *Beck* in part because of the preclusion clause. As the language of this Court's opinion in *Beck* plainly shows, the preclusion clause operated in a manner which violated the Eighth Amendment. *Beck* repeatedly refers, not to the "fundamental fairness" cases, but to this Court's Eighth Amendment jurisprudence which requires more reliable procedures in capital cases. [10] In fact, *Beck* specifically condemns the Alabama death penalty statute, especially its preclusion clause because it introduces into every case, "[a] level of uncertainty and unreliability . . . (in) the fact-finding process that cannot be tolerated in a capital case." *Becks* v. *Alabama*, *supra*, 447 U.S. at 643. *Beck* thus fully embraces and continues the theme of this Courts' decisions in death cases which have insisted that the Eighth Amendment is implicated

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[10] In fact, the Court specifically chose not to decide whether the Due Process Clause would require the giving of lesser included offense instructions in non-capital cases not governed by eighth amendment standards. *Beck* v. *Alabama*, *supra*, 447 U.S. at 638 n.14.

by a procedure which infects the reliability of the process for deciding who lives and who dies. See *Lockett* v. *Ohio*, 438 U.S. 586, 601 (1978). This Court has never required, as part of that theme, that a showing of harm or prejudice be made as a prerequisite to finding an Eighth Amendment violation. *Beck* v. *Alabama, supra; Lockett* v. *Ohio, supra; Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

B. Because An Eighth Amendment Violation Has Been Shown, Prejudice Is To Be Presumed And No Showing Of Harm Is Required For Reversal

Given an Eighth Amendment violation, no showing of harm and prejudice is required for reversal. In none of its most recent death penalty opinions, nor in any of the hundreds of cases in which the death sentence was vacated in the wake of *Furman* v. *Georgia, see Stewart* v. *Massachusetts*, 408 U.S. 845 (1972) and cases at 408 U.S. 933-940 (1972), did this Court examine whether the particular petitioner before it had been harmed. *See also, Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Moreover, the recognition by this Court that death is quantitatively and qualitatively a "different kind of punishment," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977), and that such a difference requires special reliability that "death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) militates against a requirement that prejudice be demonstrated as a prerequisite for reversal in an Eighth Amendment case.

C. Because The Preclusion Clause Affected The Entire Trial Process, Making A Precise Determination Of The Prejudice Suffered Impossible, Prejudice Must Be Presumed And Evans' Conviction Reversed Without A Showing Of Harm.

Beyond any distinction based upon the particular constitutional right at issue, there exist important policy grounds requiring reversal of Evans' conviction and sentence without an inquiry into the harm or prejudice suffered.

This Court's jurisprudence has previously divided constitutional error into two categories which implicitly recognize that all trial errors which violate the constitution do not automatically require reversal. *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967). In the first category are cases which require a demonstration of actual prejudice for reversal. In these cases, the prejudice or lack thereof is easily discernible from the record. *See e.g.*, *Kentucky* v. *Whorton*, 441 U.S. 786 (1979); *Harrington* v. *California*, 395 U.S. 250 (1969). In the second category are those cases in which prejudice is presumed so that reversal necessarily follows. Many of the cases in this second category involve constitutional errors which affect the process by which evidence is presented to the trier of fact and made part of the trial record. Such constitutional errors make it impossible for a reviewing court to assess the full impact of the violation. Cases in this category involve denial of the right to counsel, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *White* v. *Maryland*, 373 U.S. 59 (1963); denial of the right to confront witnesses, *Davis* v. *Alaska*, 415 U.S. 308 (1974); and the denial of the opportunity to present certain kinds of evidence. *Webb* v. *Texas*, 409 U.S. 95, (1972); *Ferguson* v. *Georgia*, 365 U.S. 570 (1965). It is readily apparent that the preclusion clause of the Alabama death penalty law declared invalid by this Court is a constitutional error of this second type. The preclusion clause created a basic defect in the trial process. This defect raises doubts whether all relevant evidence is in the record and makes a precise evaluation of the prejudice suffered by Evans because of it impossible.

Although the Alabama preclusion clause did not absolutely bar a defendant from presenting evidence of a lesser included offense, it did not permit the jury to return such a verdict, so that the presentation of such evidence was futile. This Court recognized as much in *Beck*, 447 U.S. at 641-42. [11]

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[11] *See* footnote 13 infra.

Thus, even though lesser included offense evidence may have been available to a defendant, there was no reason to offer such evidence, and hence no reason to make such evidence a part of the trial record. Therein lies the fatal vice of the preclusion clause as it relates to the question of constitutional error in this case. There is absolutely no way for a reviewing court adequately to determine what would or would not have been in the trial record had it not been for the preclusion clause.

At the time Evans was tried, he faced only two possible sentences: death and life imprisonment *without* the possibility of parole. Of the two, he sought death. Had the preclusion clause not existed, Evans' trial jury could have, upon consideration of proper evidence, returned a verdict of first degree murder, a crime punished by a sentence of life imprisonment *with* the possibility of parole. It is entirely possible that Evans, faced with the possibility of parole might well have actively opposed a death sentence. What is certain, however, is that measuring the impact of the preclusion clause on Evans' trial decisions and more importantly, on the content of the trial record is impossible. Thus, any inquiry into whether Evans has been harmed would require " . . . unlike most cases, unguided speculation" *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

The state seeks to minimize the constitutional damage inflicted by the preclusion clause by continually arguing that the "record" should be examined to determine whether there was evidence that would have supported a lesser included offense charge and to determine if the "record" establishes that the preclusion clause caused Evans to forego presentation of lesser included offense evidence. (Brief for Petitioner at 22). [12] This

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[12] Respondent, of course, does not concede that there is no evidence in the trial record to support a lesser included offense charge. *See* pp. 26-29 *infra*. The question of whether such evidence is in the record has not been decided by the state court. Only three of the nine justices of the Alabama Supreme

argument underscores the problem presented by the preclusion clause. Because the clause acted as an absolute bar to jury consideration of lesser included offense evidence, it discouraged any presentation of lesser included offense evidence at trial. *Beck* v. *Alabama*, 447 U.S. at 641-642.[13] Thus, any reference to the "record" as a basis for determining whether respondent was harmed or prejudiced is inappropriate.

It is impossible to speculate as to the contents of the trial record had the preclusion clause not existed. In these circumstances, reversal is required without any inquiry into the precise

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Court have expressed any opinion on the matter. *See Ritter* v. *State*, No. 77-798 (Ala. 1981) (dissenting opinion of Jones, J. joined by Maddox and Adams, J.J.).

[13] The state's argument that Evans should have presented lesser offense evidence in spite of the preclusion clause is sheer nonsense. Under the statute, as it operated, it would have been folly for a defendant to testify that he had been present at a robbery-murder but had not intentionally killed the victim. Although such testimony would have established grounds for a lesser included offense instruction on first degree murder, the statute prevented such an instruction from being given and such a verdict from being rendered.

Under the operation of the Alabama statute, a defendant admitting guilt of first degree murder ran an all but certain risk of conviction of capital murder even if the jury believed that he was not guilty of capital murder. The jury would naturally be loathe to let a confessed murderer go free. Thus, the presentation of lesser included offense evidence created a great risk of conviction for no ostensible gain.

This Court in Beck cited with approval the comments of Justice Shores who noted

> . . . jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires our juries clinical detachment from the reality of human experience.

Jacobs v. *State*, 361 So.2d 640, 651-652 (Ala. 1978) (J. Shores dissenting), *cert. denied*, 439 U.S. 1122 (1979).

nature and extent of the prejudice suffered. *Holloway* v. *Arkansas, supra, Hamilton* v. *Alabama,* 368 U.S. 52, 54 (1969). [14]

D. Even If Prejudice Is Not Presumed To Flow From The Preclusion Clause, It Is The State's Burden To Prove Beyond A Reasonable Doubt That Evans Was Not Harmed By It

Because the constitutional violation caused by the preclusion is not one of the "fundamental fairness" type which requires a showing of harm by the defendant to be cognizable, it must be either the type of violation that is "so basic to a fair trial" that it can never be harmless because prejudice is presumed, or the type of violation that may be found harmless if the state proves beyond a reasonable doubt that it is so. *Chapman* v. *California,* 386 U.S. at 23-24. There are simply no other types of constitutional violations in a criminal case. Thus even if, despite its distortion of the record, the constitutional violation worked by the preclusion clause is not of the type from which prejudice must be presumed, the burden still does not fall upon Evans to show that he was harmed by the clause. At the very least, the state must prove beyond a reasonable doubt that Evans was not harmed by the provision.

The state's approach to such a showing is two-pronged. First, the state examines the record of the evidence presented at trial, and concludes that the evidence presented at trial could not have warranted a lesser included offense instruction. This exercise, of course, simply emphasizes the harm worked by the preclu-

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[14] This Court's decision in *United States* v. *Morrison,* ___ U.S. ___, 40 U.S.L.W. 4088 (Jan. 13, 1981) does not counsel that a demonstration of prejudice is required for reversal in this case. *Morrison* concerns the most intrusive remedy of all, dismissal, and holds that "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate even though the violation may have been deliberate, *Id.* Respondent makes no claim that his prosecution should be barred; he simply asks that he be tried again in a manner that meets constitutional standards.

sion clause. The existence of the clause may well have caused the defense to forego the presentation of such evidence at trial because its only realistic effect would have been detrimental.

Second, the state reviews the record to determine "whether the record established that the preclusion clause caused Evans to forego presentation of lesser included offense evidence that he would otherwise have presented at trial." Brief for Petitioners at 22. This review apparently caused the state to reconsider its initial assertion that "there was not one jot, speck, or iota of evidence to support any lesser included offense instruction.' *Id.* at 16. Such re-evaluation is well-advised; for as we demonstrate *infra*, pp. 26-29, even the incomplete record in this case reveals substantial evidence capable of supporting a lesser included offense instruction if presented at trial. Instead, the state recreates its own Mailer-like psycho-history of Evans' behavior in this case, proffering its amateur psychologist speculation as to why Evans would have proceeded as he did even in the absence of the preclusion clause. Such musings hardly amount to proof of harmlessness beyond a reasonable doubt.

This is especially so because there is a far more plausible explanation of Evans' actions in this case than the one created by the state. Because of the preclusion clause, Evans faced almost certain conviction under a statutory scheme that provided death and life imprisonment *without parole* as the only two possible punishments. Given this grim choice, Evans, then only twenty-seven years old, chose the former. He explained to the grand jury: "I can't see spending the rest of my life locked up in a penitentiary, you know. I'm too young for that." (Tr. 332; J.A. 18). At trial, he repeated this decision: "I would rather die by electrocution than to spend the rest of my life in the penitentiary." (Tr. 211; J.A. 38). Had the constitutionally required possibility of conviction of a lesser included offense attended by a lesser penalty existed — such as that of first degree murder with its attendant punishment of life imprisonment with the

possibility of parole after 10 years [15] — Evans may well have made a very different choice as to how to proceed. [16]

E. The "Record" In This Case, Incomplete Though It May Be, Does Demonstrate That Evans Was Harmed By The Unconstitutional Preclusion Provision

Because of the harm worked by the preclusion clause, it is impossible to ascertain all of the evidence that Evans might have presented to warrant a lesser included offense instruction. However, even the constitutionally flawed record in this case provides ample evidence that could have been the basis for a lesser included offense instruction had Evans been permitted to pursue such an option at trial.

Evans was tried for and convicted of the capital offense of "robbery or attempts thereof when the victim is intentionally killed by the defendant." Code of Alabama (1975) § 13-11-1(a)(2). Under Alabama's murder statute, § 13-1-70, a "homicide . . . committed in the perpetration of, or attempt to perpetrate any . . . robbery . . . is murder in the first degree," a non-capital offense. The only difference between the capital crime for which Evans was tried and sentenced to death and first degree felony murder is, as § 13-11-2(b) makes clear, the defendant's intent to kill. With respect to this element, this

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[15] An inmate serving a sentence of life imprisonment may be considered for parole after he has served a minimum of 10 years. Code of Alabama (1975) § 15-22-28(d).

[16] The state argues that had the preclusion clause not existed, Evans still would not have presented lesser included offense evidence because the presentation of such evidence "would have guaranteed him [] a very long term in prison — the very thing he wanted to avoid, even to the point of preferring death instead." Brief for Petitioners at 28. What Evans preferred death to, however, was not "a very long term in prison," but to *life* in prison without any chance for parole. Although the state may not see much difference between a long prison term and life in prison, most defendants confronted with those possibilities assuredly do.

Court recognized in *Beck* that "the Alabama Supreme Court held that the state could not satisfy its burden of proof . . . simply by showing that the defendant intended to commit robbery or even by showing that he should have known that there was a substantial possibility that someone would be killed." 447 U.S. at 628 n.2. In this case, sufficient facts were available to place Evans' capital intent in issue.

From Evans' own testimony before the grand jury, it is clear that he did not enter the victim's pawn shop intending to kill anybody (Tr. 335; J.A. 21).

> Q. Well, have you ever thought of just going out and getting a job, a decent job?
>
> A. Oh, I've done that, sure.
>
> Q. And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?
>
> A. Well, uh, I don't know. Uh, it's kinda like an inner drive, I guess you know, it's something that I always, uh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, *you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know.* (Emphasis added).

It is equally clear from both Evans' testimony before the grand jury and that of his co-defendant — Ritter — that the only reason the victim was shot was that both defendants were convinced that he was going for his gun, and it was a matter of him or them. Evans testified as follow (Tr. 325; J.A. 12):

> Q. It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?
>
> A. Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.

Ritter testified to the same effect (Tr. 340):

> Q. Had you discussed what you were going to do when you got in the s — store?
>
> A. Yeah. John had a pistol and we decided not to take the sawed-off rifle in because it was too big. And I had, uh, some .38 shells. And I was going to ask to see a pistol then John was going to draw his; I would load mine. And we were going to take some guns and the money in the cash register and leave. Uh, but when John, uh, drew his pistol, Nassar dropped down and started crawling toward the office area. And he reached up, like he was going for a gun and that's when he was shot.

Thus, a significant question existed prior to trial as to whether the victim was shot "intentionally" within the meaning of § 13-11-1(a)(2), or out of an instinctive reaction for self-preservation. Indeed, Evans' grand jury testimony raised the issue in precisely those terms (Tr. 333-334, J.A. 19) (emphasis added):

> Q. And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?
>
> A. I didn't take time to think about it. Uh, . . .
>
> Q. You were going to shoot him [Nassar] if he made that move [for his gun]?
>
> A. I was going to shoot him if reached for a — a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's — that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well, that's — *that's pure instinct. That's self-preservation.* I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have — if — if it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick.

Had this evidence concerning the instinctive nature of the shooting been presented at trial and developed by competent defense counsel, it clearly would have warranted an instruction on the lesser offense of first degree murder had the preclusion clause not been in effect. Moreover, there might have been other evidence that defense counsel could have presented to support a first degree instruction, or an instruction on some other lesser degree of homicide. Whether such evidence exists simply cannot be fairly determined from this record.

III. EVANS' "GUILTY PLEA" DID NOT WAIVE HIS CONSTITUTIONAL CHALLENGES TO HIS CONVICTION AND SENTENCE

A guilty plea is a guilty plea is a guilty plea. That is the premise underlying the state's contention that Evans waived his constitutional challenges to the procedures under which he was convicted and sentenced to death. The premise is flatly wrong. Try as the state does to camouflage Evans' plea in "just another guilty plea" clothing, the distinctive feature of Evans' plea are far too revealing to allow the state success.

A. Under State Law, Evans' Plea Did Not Waive His Right To Have His Guilt Or Innocence Fairly Determined By A Jury And His Sentence Impartially Imposed.

The foreclosing effect of a guilty plea on a defendant's ability to raise subsequent constitutional challenges to his conviction is initially a matter of state law. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975). Within constitutional limits, each state may decide for itself which rights are waived by a plea of guilty. Weston, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L.Rev. 1214, 1217 (1977). Under established Alabama law, Evans' unlike the vast majority of defendants both in and out of Alabama who plead guilty, did not waive his right to have his guilt fairly determined in a trial before a jury.

Section 12-16-126 of the Code of Alabama (1975) establishes that the question of a capital defendant's guilt or innocence as well as his punishment must be determined by a jury. That provision, in pertinent part, provides that "the trial of [a capital] case shall be had and the question of the degree of *guilt* must be ascertained and the punishment fixed by a jury. . . ." (Emphasis added.) Similarly, § 15-15-24 of the Code of Alabama (1975) in part provides: "The court *shall not* in any event, however, impose capital punishment without the intervention of a jury." (Emphasis added.) In *Prothro* v. *State*, 370 So.2d 740 (Ala. Cr. App. 1979), the Alabama Court of Criminal Appeals, taking cognizance of these provisions, held (370 So.2d at 746) (emphasis in original):

> *Neither the death sentence nor a sentence to life imprisonment without parole is permissible whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death.*

As the court explained (370 So.2d at 747):

> The law in Alabama is . . . that only a jury can make a factual determination of guilt and only a jury can fix the punishment at death.

This case proceeded as required under Alabama law. Eight days after his arraignment, Evans was tried before a jury in precisely the same manner as he would have been tried had he pleaded not guilty. That jury was charged with the responsibility for determining Evans' *guilt or innocence*. Evidence was presented, testimony was heard, and objections were made just as though Evans had pleaded not guilty. At the close of the case, the jury was instructed on the elements of the capital offense with which Evans was charged (Tr. 223-224; J.A. 44). They were instructed that Evans was presumed innocent. (Tr. 224-225; J.A. 44-45). They were instructed on the standard of proof beyond a reasonable doubt and told: "Until and unless the State proves the Defendant guilty beyond a reasonable doubt, *you*

cannot convict him." (Tr. 225; J.A. 45). Indeed, specifically addressing Evans' guilty plea, the trial judge instructed the jury that "in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further." (Tr. 223; J.A. 44).

Thus Evans, his counsel, the trial court and the prosecution all knew that Evans did not and could not waive his right to have his guilt or innocence fairly determined by a jury trial when he entered his plea. Just as in the case of a capital defendant who pleaded not guilty, the dispositive decision on the question of Evans' guilt or innocence was for the jury to make. Consequently, the fact-finding process in Evans' trial, no less than the fact-finding process in Beck's case, was infected by the procedures that this Court found "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Beck* v. *Alabama, supra,* 447 U.S. at 643.

The state has never even suggested that the full jury trial that Evans was afforded to determine his guilt or innocence may have been unnecessary because of his plea. Indeed, in the brief before this Court the state admits: "Under Alabama law, a capital case guilty plea is conclusive on the factual issue when, but only when, the state presents sufficient evidence in addition to the plea for the jury to find the defendant guilty. Brief for Petitioners at 38. The state's position appears to be that although a jury trial to determine guilt as well as punishment is required by state law, that trial may be as lawless, unconstitutional and rigged as possible because the defendant's guilty plea precludes him from complaining about all inadequacies at trial. [17]

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[17] Under this theory, a capital defendant who entered a guilty plea would be precluded from challenging the knowing use of perjured testimony at the statutorily required trial on his guilt or innocence.

The state's contention that the court below misconstrued the effect of Evans' plea under Alabama law or at least erred in failing to certify the question to the Alabama Supreme Court would ignore the dictates of § 12-16-126 and § 15-15-24 and adopt this untenable position. Logic aside, that hope is unfounded because the Alabama Supreme Court has already declined to adopt the state's position at least twice. First, as discussed in the Fifth Circuit's opinion on rehearing, in addressing the plea of Evans' co-defendant — a plea identical to Evans' — the Alabama Supreme Court found that rather than the plea having the preclusive effect asserted by the state, "The trial judge . . . did not accept his guilty plea but instead set the matter for presentation to a jury." *Ritter* v. *State*, 375 So.2d 270, 276 (Ala. 1979) *vacated*, 448 U.S. 903 (1980).

Second, on direct appeal of this case, the Alabama Supreme Court, like the Alabama Court of Criminal Appeals, passed on Evans' constitutional challenges to his conviction and sentence without any intimation whatsoever that Evans' plea waived his constitutional claims or in any way confined or limited appellate review of them.[18] This action was in accordance with Alabama law, which provides for the automatic appellate review of capital convictions regardless of whether the defendant pleaded guilty. Code of Alabama 1975, §§ 12-22-150, 13, 11, 5. Such appellate review is not confined to errors preserved by counsel, but extends to any error prejudicial to the defendant. Code of Alabama 1975, §§ 12-22-41, *Lee* v. *State*, 265 Ala. 623, 93 So.2d 757 (1957). *See Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Thus, the state's assertion that the Court of Appeals misconstrued Alabama law concerning the effect of Evans' plea or at

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[18] The Court of Criminal Appeals specifically held that "we find that the procedures here mandated by the Alabama Statutes fully comport with [the] constitutional demands of the Eighth and Fourteenth Amendments to the United States constitution . . ."

least erred in failing to certify the question to the Alabama Supreme Court is meritless. There is obviously no need for a federal court to certify a question of state law to a state court when the actions and rulings of every level of state court, including the state supreme court, in the very case before the federal court make the answer to the state law question clear.

B. Evans' Plea Does Not Foreclose Federal Review Of His Constitutional Claims

The state seems to argue that regardless of the effect of Evans' plea under Alabama law, federal law forecloses habeas review of his constitutional claims. For two reasons, Evans' plea did not waive or foreclose federal habeas review of his constitutional challenges to his conviction and sentence. First, as just demonstrated, "although termed. . . . a 'guilty plea,' . . . [Evans'] plea had legal consequences quite different from the consequences of the pleas entered in traditional guilty-plea cases." *Lefkowitz* v. *Newsome*, 420 U.S. at 290. Alabama has never treated Evans' plea as " 'a break in the chain of events which has preceded it in the criminal process' " by which "the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Id.* at 289. Instead, both at trial and on appeal, Evans was treated in all respects as he would have been treated had he pleaded not guilty. Where the state does not treat a guilty plea as a "break" in the criminal process which results in the forfeiture of certain rights, so that those rights are preserved in the event that a defendant pleads guilty as well as in the event that a defendant pleads not guilty, "[i]n neither event does the State assert any claim of finality because of the judgment of conviction." *Id.*

Second, the constitutional deprivations of which Evans complains — the faulty fact-finding process at his trial and the institutionalized bias for death at his sentencing — are deprivations that occurred *after* Evans pleaded guilty. Both *Lefkowitz* v. *Newsome*, *supra*, and *Tollett* v. *Henderson*, 411 U.S. 258

(1973) make clear that such claims are not waived or forfeited under federal law. [19] In *Newsome* this Court noted that *Brady* v. *United States*, 397 U.S. 742 (1970), and its companion cases held only that "a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the *pretrial* proceedings." 420 U.S. at 288 (emphasis added). As explained in *Tollett*, 411 U.S. at 267 (emphasis added):

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea*."

The state, however, implies that *Newsome* and *Tollett* were disapproved or even overruled by a footnote in this Court's *per curiam* decision in *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975). That footnote plainly did not overrule *Tollett* or *Newsome*. Indeed, *Newsome*, a full decision on the merits decided only nine months before the issuance of the *per curiam* in *Menna*, is not even cited, let alone discussed and overruled, in *Menna*.

Moreover, even indulging the state's assumption that the *Menna* footnote is now the sole and dispositive guideline for determining, as a matter of federal law, which claims are

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[19] Contary to the state's intimation, *Brady* v. *United States*, 397 U.S. 742 (1970), does not hold or even hint otherwise. The state suggests that "[b]ecause the defect involved in *Brady* . . . *concerned* the punishment provisions of the statute, it cannot be categorized as a defect antecedent to the plea." Brief for Petitioners at 40 (emphasis added). However, Brady's constitutional claim was not that the punishment procedure to which he was actually subjected was unconstitutional, but rather that because the potential for a capital sentence existed only if he went to trial, his guilty plea itself was involuntary. In sharp contrast, Evans does not challenge the voluntariness of his plea, but claims, among other things that the sentencing procedure as actually applied to him deprived him of due process by unduly biasing the sentencing judge towards death.

forfeited as the result of a guilty plea, Evans did not lose his right to challenge his constitutionally unfair trial by pleading guilty. As the Court explained in that portion of the *Menna* footnote quoted in the state's brief at 41, "A guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the *valid* establishment of factual guilt. . . ." (Emphasis added.) In the case of a capital defendant, Alabama has decided that a guilty plea does not and cannot as a matter of law "valid[ly] establish [] factual guilt." Under unequivocal Alabama law — and the state does not contend otherwise — the factual guilt of a capital defendant can only be validly established after a full trial before a jury. Therefore, the constitutional violations of which Evans complains — defects at the trial to determine his factual guilt which this Court has already held "in every case . . . introduce a level of uncertainty and unreliability into the fact-finding process, 447 U.S. at 443" were not forfeited by his plea.

IV. THE COURT BELOW WAS CORRECT IN REFUSING TO CERTIFY STATE LAW QUESTIONS TO THE ALABAMA SUPREME COURT

The state filed a motion in the Fifth Circuit asking that court to certify seven questions of state law to the Alabama Supreme Court. (J.A. 68-69). Of those seven, only two remain for consideration. The first of these questions concerns the issue whether the record of Evans' trial would support a lesser included offense instruction. The second concerns the effect under Alabama law of Evans' guilty plea at arraignment. Neither of these questions is appropriate for certification.

A. Certification Is Appropriate Only Where The Issue Of State Law Is Uncertain

Certification is a form of abstention and the traditional requirements of abstention law are plainly applicable to certification questions. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391

(1974). The essential prerequisite for abstention and hence certification is the existence of an "uncertain issue of state law," the resolution of which may eliminate or materially alter the federal constitutional question. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971) citing *Harmon* v. *Forssenius*, 380 U.S. 528, 534 (1965). The state has clearly failed to establish this pre-requisite.

The first issue on which the state sought certification is plainly inappropriate for its use. As previously noted, the existence or non-existence of evidence of lesser included offenses in the trial record is an irrelevant inquiry because of the effect of the preclusion clause. See pp. 20-24, *Supra*. Even if such inquiry were relevant, the state law concerning lesser included offense intructions is anything but uncertain. Quite the contrary, the cases outlining the required standard for lesser included offense instructions under Alabama law are legion. As the Court of Criminal Appeals recently noted

> A court may properly refuse to charge on a lesser included offense only (1) when it is clear to the judicial mind that there is no evidence to bring the offense with the definition of the lesser offense, or (2) when the requested charge would have a tendency to mislead or confuse the jury.

Harris v. *State*, 398 So.2d 777, 778 (Ala. Cr. App. 1981) *cert. denied*, 398 So.2d 780 (Ala. 1981). In fact, in Alabama,

> . . . every accused is entitled to have charges given, which would not be misleading, which would correctly state the law of his case, and which are supported by any evidence, however weak, insufficient or doubtful in credibility.

Chavers v. *State*, 361 So.2d 1106, 1107 (Ala. 1978). It is thus readily apparent that questions about whether particular lesser included offense instructions should have been given, do not involve "uncertain questions of state law" and therefore are improper for certification. *Lake Carriers Association* v. *MacMullan*, 406 U.S. 498, 511 (1972). Federal courts are obvious-

ly as competent as state courts to apply settled state law to the facts of a particular case.

This principle applies with equal force to the guilty plea question. The law surrounding guilty pleas in capital cases is well settled by statute and case law. See pp. 29-33, *supra*. The particular legal issue that the state seeks to have certified is not uncertain, but has been recently clarified by the state court system in *Prothro* v. *State*, 379 So.2d 740 (Ala. Cr. App. 1979).

Thus, the decision of the court below not to utilize a certification procedure was correct. There is no "broad encyclical commanding automatic remission" of these state law questions to state court. *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967). Rather as this court has often said, abstention, hence, certification "should not be ordered merely to await an attempt to vindicate a claim in state court." *Wisconsin* v. *Constantineau*, 400 U.S. at 439. Where, as here, there is no ambiguity in the state law, "the federal court should not abstain but should proceed to decide the federal constitutional claim." *Id.*

B. In This Case, The State's Request For Certification Was A Blatant Attempt At Forum Manipulation

To support its contention that the Fifth Circuit erred in declining to certify any questions to the Alabama Supreme Court, the state piously invokes the policy of "cooperative judicial federalism," and laments the damage to that policy allegedly wreaked by the decision below. Brief for petitioners at 46. In light of the state's actions in this case, its invocation of the policy of "cooperative judicial federalism" rings hollow, and amounts to nothing more than a disingenous attempt to manipulate state and federal forums to suit whatever momentarily appears to be in the state's interest.

On April 24, 1979, the state, by letter, notified Evans' counsel of the state's position concerning the exhaustion of remedies in this case when this case was before the district court. In this letter[20] Mr. Carnes, the Alabama Assistant Attorney General who has represented the state throughout this proceeding, wrote:

> It is respondents' position that petitioner exhausted all of his state remedies in regard to issues raised in his petition now pending in the United States District Court for the Southern District of Alabama. . . . Finally, it is respondents' position that petitioner has exhausted all other issues and claims of whatever nature.

He ended the letter by stating:

> Respondents hereby stipulate and admit that petitioner has exhausted all state remedies that are available to him as to any and all issues and claims concerning his conviction and sentence.

Thus, on April 24, 1979, the state acted to compel the federal court system to decide every issue conceivably presented by this case. The state specifically waived its right to have the state courts act in any way.[21] After this Court's decision in *Beck*, however, the state drastically changed its tune. It suddenly saw the "virtues" of having certain questions considered by the Alabama Supreme Court so that the Fifth Circuit might be spared the task of ruling on those questions that the state was only too happy to have the federal courts decide in 1979.

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[20] A copy of the letter was attached to the supplemental brief filed by Evans in the Fifth Circuit. In its answer to Evans habeas petition in the district court, the State expressly waived the exhaustion of remedies requirement. (R. 61).

[21] This waiver, as the states recognized, was proper and effective. *Warren* v. *Connor*, 365 F.2d 590 (5th Cir. 1966); *Tolg* v. *Grimes*, 355 F.2d 92 (5th Cir. 1966).

Although exhaustion and certification are two different types of federal court abstention, they involve the same policies and interests. Like certification, the doctrine of exhaustion rests on concepts of comity rather than jurisdiction. Both certification and exhaustion are doctrines

> . . . which [teach] that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter.

Fay v. *Noia*, 372 U.S. 391, 419-420 (1963). The state's actions in this case show that the state's interest is not in maintaining the proper relationship between state and federal courts, but rather in seeking whatever forum it believes to be most favorable at a given time.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and
JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

EVANS' ARGUMENTS CONCERNING THE VALIDITY OF HIS CONVICTION SHOULD BE REJECTED

A. Evans' Argument Concerning The Jury Verdict Form Requirement

On pp. 16-18 of his brief, Evans appears to argue that, even disregarding the preclusion clause, his *conviction* should be set aside because of the jury verdict form requirement discussed in *Beck v. Alabama*, 447 U.S. 625, 633, 638-645 (1980). That statutory provision required that every verdict form convicting a defendant of a capital offense "fix the punishment at death," *Code of Alabama* 1975, §13-11-2(a), even though the actual sentencing decision was made later by the trial court judge following a post-conviction hearing. *Id.*, at §§13-11-3 and 13-11-4 (R. 67; Tr. 9-15, 229-243).

While Alabama's pre-*Beck* statute under which Evans was convicted was not actually a mandatory death penalty statute (R. 67), it was "an apparently mandatory death penalty statute" from the jury's perspective because the jury was not told of the trial judge's sentencing function. *Beck v. Alabama*, 447 U.S. at 638-639 & n. 15.

This Court did note in *Beck* that, "the apparently mandatory nature of the death penalty may encourage it [the jury] to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." *Id.*, at 642-643 (footnote omitted). This Court also observed that, "it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did." *Id.*, at 645. The facts in *Beck* were entirely different from the facts in this case, but even assuming that the verdict form requirement had the maximum imaginable effect on this case, it could only have affected Evans' sentence and not his conviction.

There are only two conceivable effects that the verdict

form requirement could ever have had in any case. One is to have impermissibly encouraged an acquittal. *Beck v. Alabama*, 447 U.S. at 642-643. This Court has never before suggested that a defendant is entitled to have his conviction reversed because of an error which improperly encouraged the jury to *acquit* him, and it should not do so now. Evans' argument that he was "clearly prejudiced" by the verdict form requirement because "the jury's determination of Evans' guilt may have been impermissibly infected" by that requirement is utter nonsense. If the jury's guilt determination was "infected" by the verdict form requirement at all, it was infected in Evans' favor, and he was convicted in spite of the verdict form rather than because of it.

The only other conceivable effect the verdict form requirement could ever have had in any case was to have improperly motivated or encouraged the trial judge to sentence the defendant to death. *Beck v. Alabama*, 447 U.S. at 645. That did not happen in this case, for the reasons discussed on pp. 18-19, *infra*. But even assuming that it did, such an error could only have affected the sentence and not the conviction. This Court has never held that an error which affects a capital sentencing decision vitiates an otherwise valid capital conviction. Indeed, it has always held to the contrary.

In *Witherspoon v. Illinois*, 391 U.S. 510, 523 n. 21 (1968), this Court held that its decision did not "render invalid the *conviction*, as opposed to the *sentence* . . ." The per curiam opinion in *Furman v. Georgia*, 408 U.S. 238, 240 (1972), reversed the judgment in each case included therein only "insofar as it leaves undisturbed the death sentence imposed," and remanded each case for further proceedings not inconsistent with that opinion. *Accord, e.g., Woodson v. Louisiana*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); *Lockett v. Ohio*, 438 U.S. 586, 608-609 (1978); *Adams v. Texas*, 448 U.S. 38, 51 (1980); *Eddings v. Oklahoma*, 102 S. Ct. 869, 877 (1982). Sentencing errors simply do not undermine otherwise valid convictions. *Cf., Brady v. Maryland*, 373 U.S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sen-

tencing is limited to ordering a new sentence hearing).

After vacating the death sentence in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), this Court remanded the case to the court below "with directions to order further [sentence] proceedings at the trial court level not inconsistent with this opinion." Likewise, *Estelle v. Smith*, 451 U.S. 454, 473-474 (1981), recognized that where this Court finds error in a capital sentence but the conviction "remains undisturbed, the State is free to conduct further [capital sentence] proceedings not inconsistent with this [Court's] opinion." Accordingly, even if this Court concludes that the verdict form requirement affected the sentence in this case, the ultimate result should be like that in *Gardner* and *Estelle*. Evans' capital conviction should be reinstated and the State should be free to conduct new sentence proceedings in this case.[1] The verdict form requirement is simply not relevant to the validity of Evans' *conviction*.[2]

B. Evans' Argument Concerning the Harm and Prejudice Requirement in Eighth Amendment Cases

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[1]As *Estelle v. Smith*, *supra*, implies, whether curative sentence proceedings can be conducted or the sentence should be commuted to one less than death is a question of state law. *See, Spivey v. Zant*, 661 F. 2d 464, 478-479 (5th Cir. 1981); *Battie v. Estelle*, 655 F. 2d 692, 703 (5th Cir. 1981); *cf., Rose v. Hodges*, 423 U.S. 19 (1975) (holding that whether and how to commute a pre-*Furman* death sentence is not a federal issue).

Alabama law does provide for curative sentence proceedings to correct errors which affect a capital sentence but not the conviction. *E.g., Johnson v. State*, 399 So. 2d 859, 874 (Ala. 1979); *Cook v. State*, 369 So. 2d 1251, 1257-1258 (Ala. 1979). If necessary, a new sentence proceeding in this case could be conducted before a new jury in accordance with the guidelines set out in *Beck v. State*, 396 So. 2d 645, 662-664 (Ala. 1980). *See, Ritter v. State*, 403 So. 2d 154, 157 (Ala.) (separate opinion of Jones, J., joined by Maddox and Adams, J.J.), *vacated and remanded on other grounds*, 102 S. Ct. 376 (1981). The new sentencing jury would not be informed of the mandatory penalty language contained in the verdict of the jury which convicted Evans, and the new sentence decision would therefore not be tainted by it.

[2]For the reasons discussed on pp. 18-19, *infra*, Evans' sentence as well as his conviction is valid and should be reinstated.

Evans' argument that it is not necessary for him to prove that the preclusion clause harmed or prejudiced him because this is an Eighth Amendment case should be rejected for two independently adequate reasons. First, the validity of Evans' conviction is controlled by the Due Process Clause, not the Eighth Amendment. Second, even if the Eighth Amendment were controlling, lack of harm or effect would still be relevant.

1. The Due Process Clause and Not the Eighth Amendment Controls the Validity of the Conviction

Evans' habeas petition itself recognizes that the Eighth Amendment is not relevant to the validity of his conviction. In neither his original nor amended petition did Evans ever allege that his *conviction* was invalid on Eighth Amendment grounds. (A. 48-51, 57)[3] Instead, the petition's only averment that the preclusion clause affected the validity of Evans' conviction was an allegation that the clause "which precluded juries from considering lesser included offenses violated his right to due process of law." Respondent's Brief at 10 (footnote omitted).

Evans' contention that *Beck v. Alabama*, 447 U.S. 625 (1980), is based on the Eighth Amendment's Cruel and Unusual Punishment Clause rather than the Due Process Clause is wrong. Both grounds were argued in *Beck* and the decision does not explicitly specify either, but the opinion is concerned more with due process considerations of fairness and with the integrity of the factfinding process than with what constitutes cruel and unusual punishment.[4] This

[3]Paragraph 12 of the petition did say that Evans' "conviction and sentence were obtained in violation of his rights as guaranteed by the Eighth and Fourteenth Amendments," but it went on to specify that his conviction was attacked on Fourteenth Amendment grounds while his sentence was attacked on both Eighth and Fourteenth Amendment grounds. (A. 49-50)

[4]Likewise, rather than being concerned with notions of cruel and unusual punishment, the court below decided this case on what it perceived to be "fundamental notions of fairness." 628 F. 2d at 401, Pet. App. at 20a.

tencing is limited to ordering a new sentence hearing).

After vacating the death sentence in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), this Court remanded the case to the court below "with directions to order further [sentence] proceedings at the trial court level not inconsistent with this opinion." Likewise, *Estelle v. Smith*, 451 U.S. 454, 473-474 (1981), recognized that where this Court finds error in a capital sentence but the conviction "remains undisturbed, the State is free to conduct further [capital sentence] proceedings not inconsistent with this [Court's] opinion." Accordingly, even if this Court concludes that the verdict form requirement affected the sentence in this case, the ultimate result should be like that in *Gardner* and *Estelle*. Evans' capital conviction should be reinstated and the State should be free to conduct new sentence proceedings in this case.[1] The verdict form requirement is simply not relevant to the validity of Evans' *conviction*.[2]

B. Evans' Argument Concerning the Harm and Prejudice Requirement in Eighth Amendment Cases

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[1]As *Estelle v. Smith*, *supra*, implies, whether curative sentence proceedings can be conducted or the sentence should be commuted to one less than death is a question of state law. *See, Spivey v. Zant*, 661 F. 2d 464, 478-479 (5th Cir. 1981); *Battie v. Estelle*, 655 F. 2d 692, 703 (5th Cir. 1981); *cf., Rose v. Hodges*, 423 U.S. 19 (1975) (holding that whether and how to commute a pre-*Furman* death sentence is not a federal issue).

Alabama law does provide for curative sentence proceedings to correct errors which affect a capital sentence but not the conviction. *E.g., Johnson v. State*, 399 So. 2d 859, 874 (Ala. 1979); *Cook v. State*, 369 So. 2d 1251, 1257-1258 (Ala. 1979). If necessary, a new sentence proceeding in this case could be conducted before a new jury in accordance with the guidelines set out in *Beck v. State*, 396 So. 2d 645, 662-664 (Ala. 1980). *See, Ritter v. State*, 403 So. 2d 154, 157 (Ala.) (separate opinion of Jones, J., joined by Maddox and Adams, J.J.), *vacated and remanded on other grounds*, 102 S. Ct. 376 (1981). The new sentencing jury would not be informed of the mandatory penalty language contained in the verdict of the jury which convicted Evans, and the new sentence decision would therefore not be tainted by it.

[2]For the reasons discussed on pp. 18-19, *infra*, Evans' sentence as well as his conviction is valid and should be reinstated.

Court relied more on *Keeble v. United States*, 412 U.S. 205 (1973), than on any other precedent, 447 U.S. at 633-635, and *Keeble* is a non-capital case that expressly espouses due process principles. In addition, this Court's statement, discussing evidentially supported lesser included offense instructions, that it was not deciding "whether the Due Process Clause would require the giving of such instructions *in a non-capital case*," 447 U.S. at 638 n. 14 (emphasis added), implies that the Court *was deciding* that the Due Process Clause requires the giving of such instructions *in a capital case. See, United States ex. rel. Brodie v. Hilton*, 496 F. Supp. 619, 622 (D.N.J. 1980) (referring to *Beck's* "conclusion that due process was denied").

Moreover, language, history, and precedent confine the purview of the Eighth Amendment's Cruel and Unusual Punishment Clause to issues of punishment — its nature, its purpose, its proportionality, its pattern, and the conditions under which it is imposed. *E.g., Rhodes v. Chapman*, 101 S. Ct. 2392 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102-105 (1976); *Coker v. Georgia*, 433 U.S. 584, 591-592, 598-600 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 169-176, 186-187 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); *Furman v. Georgia*, 408 U.S. 238 (1972). In its two hundred year history, this Court has never invalidated on Eighth Amendment grounds a *conviction* as distinguished from a punishment.[5]

Unless this Court is willing "to wrench the Eighth Amendment from its language and history," *Rhodes v. Chapman*, 101 S. Ct. at 2399 (1981), the Due Process Clause and not the Eighth Amendment determines the validity of Evans' conviction.

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[5] *Weems v. United States*, 217 U.S. 349, 382 (1910), in which the entire proceedings were dismissed for want of an alternative punishment is no exception, because it was the punishment and not the conviction held to violate the Cruel and Unusual Punishment Clause. Nor is *Robinson v. California*, 370 U.S. 660 (1962), an exception, since the holding of that case was that the punishment — any punishment — was cruel and unusual when inflicted for a status crime.

2. The Eighth Amendment is Not Violated in a Case by the Mere Existence of an Unconstitutional Provision Which Neither Applies to Nor Affects the Case

Even if this case is controlled solely by the Eighth Amendment, the fact that the preclusion clause did not harm or affect Evans is still determinative. As the cases cited on pp. 2-3 of this brief, above, indicate, this Court has always adhered to the doctrine that capital sentencing errors which violate the Eighth Amendment do not vitiate otherwise valid capital convictions. Implicit in that doctrine is a concept at least akin to a requirement of harm —the Eighth Amendment and its remedies extend only so far as is necessary to correct the harm done by the defect or error in question.

In this case, if the preclusion clause did violate the Eighth Amendment, it could only have done so in those cases in which it had some effect — either by barring lesser included offense instructions which otherwise would have been given, or by causing a defendant to forego presentation of lesser offense evidence that he would otherwise have presented. The preclusion clause had neither effect in this case. Brief for Petitioners at 22-30. Therefore, it did not violate the Eighth Amendment in this case.

Stated differently, it is at war with logic to suggest that an otherwise permissible punishment becomes "cruel and unusual" in a case because of the mere existence of a statutory provision which has absolutely no effect in the case. *Cf., Dobbert v. Florida*, 432 U.S. 282, 300 (1977) (rejecting a capital defendant's ex post facto claim because it amounted to "complaining in the abstract about some change in the law, which as events proved, would have no applicability to his case.") The absurdity of Evans' position is illustrated by analogy to *Coker v. Georgia*, 433 U.S. 584 (1977), which struck down as violative of the Eighth Amendment the part of Georgia's statute which made non-homicide rape a capital offense. If the Eighth Amendment is violated by the mere existence of an unconstitutional provision in a capital

statute without regard to whether that provision harms or affects a particular defendant, then the convictions or at least the death sentences are due to be set aside in all Georgia pre-*Coker* capital cases including those non-rape cases that clearly involved murder.[6] It matters not that the *Coker* provision did not apply to and had no effect in those cases — something which is equally true of the preclusion clause in this case —because it is Evans' contention that harm is conclusively presumed in all Eighth Amendment cases.

Whether it be described as a threshold requirement of harm or as an inherent restriction of the remedy to cases actually affected, the Eighth Amendment does embody limitations inconsistent with Evans' position in this case.

C. Evans' Argument that the Harm and Prejudice Requirement Should Be Dispensed with Because of the Nature of the Preclusion Clause

1. The Record is Not Incomplete or Flawed

Contrary to Evans' assertions, the record is not incomplete concerning whether the existence of the preclusion clause caused Evans' self-destructive course of conduct. The record contains voluminous evidence not only of the objective facts concerning Evans' course of conduct but also of Evans' motivation in pursuing that course of conduct. Brief for Petitioners at 3-7 and 25-30. The record also contains the conclusions of the psychiatrist who examined Evans for the purpose of determining his mental state and motivation. (A. 27-28) Evans' assertion that the State's position is based on nothing more than "amateur psychological speculation" not only flies in the face of the exten-

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[6]Likewise, Evans' contention would mean that every Georgia capital conviction or at least every death sentence imposed before *Godfrey v. Georgia*, 446 U.S. 420 (1980), was due to be set aside because of that decision, even if the aggravating circumstance condemned in *Godfrey* was not applied and had no effect in that particular pre-*Godfrey* case.

sive objective evidence and Evans' own sworn statements at the time, but also conveniently ignores the expert *professional* psychiatrist's determination that Evans was "sincere in seeking the death penalty, preferring extinction to a long prison sentence." (A. 28) *Accord, Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977) ("A careful reading of this record convinces this Court . . . . [that Evans] is sincere in seeking the death sentence, preferring this course to a long prison sentence."), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

The existence of the preclusion clause did not "flaw" the record, as Evans suggests. Evans concedes that "the Alabama preclusion clause did not absolutely bar a defendant from presenting evidence of a lesser included offense." Brief for Respondent at 21.[7] But he contends that the clause

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[7]The opinion in *Reed v. State*, 407 So. 2d 162, 163 (Ala. 1981) (on rehearing), contains a statement that because the preclusion clause did not allow lesser offense jury instructions, "any offer of evidence thereof, or any plea based thereon, would have been irrelevant and impermissible at trial under that statute." To the extent that statement suggests that a pre-*Beck* defendant could not present and have admitted lesser offense evidence, then it is clearly wrong, as Evans' concession recognizes.

Because proof of a lesser included offense must by definition tend to negate an element of the higher offense, *see, e.g., Sansome v. United States*, 380 U.S. 343, 350 (1965); *Payne v. State*, 391 So. 2d 140, 143 (Ala. Cr. App.), *cert. denied*, 391 So. 2d 146 (Ala. 1980), any lesser offense evidence was relevant and admissible notwithstanding the preclusion clause because such evidence would always — by definition — tend to disprove an element of the capital offense. *Reed v. State*, 407 So. 2d at 164 (Maddox, J., concurring specially). Indisputable proof that a pre-*Beck* capital defendant could introduce lesser offense evidence notwithstanding the preclusion clause is the fact that most, including Beck himself, *Beck v. Alabama*, 447 U.S. at 629-630, actually did.

It may be that the statement in the *Reed* opinion is simply "ambiguous." *Reed v. State*, 407 So. 2d at 165 (Maddox, J., concurring specially). If not, then it is a clearly erroneous characterization of how the preclusion clause operated, with the clarity of the error being underscored by Evans' concession here that the clause did not bar lesser offense evidence. This Court is concerned not with how a state court characterizes the operation of a state law but rather with how that law actually operated, *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 432 (1919), and this Court alone must make the final judgment concerning histori-

discouraged the presentation of such evidence and thereby "flawed" the trial record. On p. 23 & n. 13 of his brief, Evans argues that the preclusion clause discouraged presentation of lesser offense evidence, because it would have been "folly" for a defendant to present such evidence since it would have "created a great risk of conviction for no ostensible gain." That argument should be rejected for three reasons. First, the vast majority of pre-*Beck* capital defendants, including Beck himself, *Beck v. Alabama*, 447 U.S. at 629-630, *did* present lesser offense evidence. Second, instead of discouraging it, the existence of the preclusion clause actually *encouraged* presentation of lesser offense evidence in Evans' unusual case. Brief for Petitioners at 28-29. Third, it is absurd to suggest that Evans was frightened out of presenting lesser offense evidence by the prospect that it would enhance the risk that he would be convicted of the capital offense since the alternative course of conduct he chose was to affirmatively seek such a conviction.

Moreover, even if the preclusion clause had "flawed" the trial record or caused it to be incomplete, it was incumbent upon Evans in this habeas proceeding to prove as much by proving that there was lesser offense evidence and that he would have presented it had the clause not existed. Brief for Petitioners at 30-36.

2. This Court's Decisions Do Not Support Evans' Position

The cases cited on pp. 21-24 of Evans' brief do not support his position that the harm and prejudice prerequisite should be dispensed with in this case. At most, those cases are illustrative of the exception recognized in Brief for Petitioners at 32: a showing of prejudice is not always necessary where a state has denied or significantly impaired a right which is specifically guaranteed in the

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cal facts and their legal effect in constitutional disputes. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959); *Truax v. Corrigan*, 257 U.S. 312, 324 (1921).

Bill of Rights or is recognized as encompassed within the due process right to fair trial. Four of the cases involve specific Sixth Amendment guarantees.[8] While the other two cases are due process cases, they both involve a specific right recognized as encompassed within the due process right to fair trial.[9] Evans was not denied a specific Bill of Rights guarantee nor was he denied a specific right recognized as encompassed within the due process right to a fair trial. Instead, Evans' claim is that the mere existence of the preclusion clause rendered his trial and conviction unfair. That is a fundamental fairness due process claim which requires proof of actual prejudice. See pp. 4-5, above, and Brief for Petitioners at 30-33.

A second glaring distinction between the cases Evans cites on pp. 21-24 of his brief and the present case is that none of those cases were habeas corpus proceedings. The significance of this distinction is illustrated by *Holloway v. Arkansas*, 435 U.S. 475 (1978), and its subsequent explication in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). While

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[8] *Holloway v. Arkansas*, 435 U.S. 475 (1978), *White v. Maryland*, 373 U.S. 59 (1963), and *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), are right to counsel cases. *Davis v. Alaska*, 415 U.S. 308 (1974) is a confrontation clause case.

Even when a specific Bill of Rights guarantee is denied, a showing of prejudice is sometimes essential to establish infringement, *see, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), or to warrant reversal once infringement is established, *see, e.g., United States v. Morrison*, 449 U.S. 361 (1981). In Evans' brief at 24 n. 14, he argues that the *Morrison* decision applies only to "the most intrustive remedy of all, dismissal." Not so. Necessarily implicit in *Morrison* is a holding that because of the lack of prejudice the Sixth Amendment violation in that case would not merit reversal of a conviction either. Otherwise, this Court's action in reinstating the indictment would have been utterly futile.

[9] *Webb v. Texas*, 409 U.S. 95 (1972), involved denial of the right to present testimony, which is essential to a fair trial, as the Sixth Amendment right to compulsory process indicates, *see, Washington v. Texas*, 388 U.S. 14 (1967). *Ferguson v. Georgia*, 365 U.S. 570 (1961), involved denial of the right to assistance of counsel in presenting the defendant's own testimony, which is essential to a fair trial as the Sixth Amendment right to counsel indicates, *see, Gideon v. Wainwright*, 372 U.S. 335 (1963).

Holloway contains some language favorable to Evans' position, that language is best understood as a "prophylactic gloss," *Holloway v. Arkansas*, 435 U.S. at 493 (dissenting opinion of Powell, J., joined by Blackmun and Rehnquist, J.J.), designed to ensure that a defendant is permitted to demonstrate prior to trial, if he offers to do so, the prejudice which will flow from his attorney's conflict of interest. As the subsequent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (majority opinion by Powell, J.), explains, when a conflict of interest claim is not made until a federal habeas proceeding, the prophylactic rationale of *Holloway* does not apply and the defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." Since Evans did not request an opportunity to demonstrate prior to trial how the existence of the preclusion clause would prejudice him, he must now demonstrate that it actually did adversely affect him.

Far from supporting Evans' contention that post hoc determinations of prejudice are not feasible, this Court's decisions establish the contrary. For example, *United States v. Marion*, 404 U.S. 307, 324-326 (1971), held that "the real possibility of prejudice" inherent in a 38-month delay was insufficient to establish a due process violation based on pre-indictment delay, and required that "substantial prejudice" must be proven. Such a requirement is necessarily premised on the feasibility of a post hoc inquiry into the existence and extent of prejudice. Another example is *Kentucky v. Whorton*, 441 U.S. 786, 789-790 (1979) (whether failure to instruct on presumption of innocence deprived the defendant of a fair trial depends on a post hoc evaluation of "the totality of the circumstances" to gauge prejudice.)

Nor are inquiries into prejudice precluded when subjective mental states are involved and the issue depends on questions of motivation or impact. *Smith v. Phillips*, 50 U.S.L.W. 4190 (Jan. 25, 1982), sanctions the feasibility of a post-trial inquiry into whether a juror placed in a potentially compromising position was actually biased, an inquiry into the juror's mental state at the time of the indiscretion. Similarly, the "cause" part of the "cause and

prejudice" exception to *Wainwright v. Sykes*, 433 U.S. 72 (1977), is dependent on a post hoc determination of the cause of inaction, a determination that will virtually always delve into questions of motivation. Finally, in holding that *Bruton* error was harmless in *Harrington v. California*, 395 U.S. 250, 254 (1969), this Court noted that "[o]ur judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." Likewise, in this case this Court's judgment can and should be based on its own reading of the record and on what seems to have been the probable impact (or lack of impact) of the preclusion clause on Evans' mind.[10]

3. Evans Has Never Attempted to Make the Record More Complete and He is Not Asking for an Opportunity To Do So Now

Evans' contention that the record is incomplete or flawed is belied by the fact that Evans has never sought to make the record more complete or to correct what he says are its flaws by offering evidence that the preclusion clause affected his course of action. Since this is a habeas corpus case Evans had ample opportunity to present any evidence he wanted in the district court. Indeed, a hearing was held on the habeas petition and Evans did call a witness to testify on another issue, but Evans offered no evidence at all that the existence of the preclusion clause had affected him in any way. Brief for Petitioners at 9. Evans himself did not even testify that the preclusion clause had influenced him.

Since the district court proceedings occurred before the *Beck* decision, Evans might have argued in the court of

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[10]In *Harrington* this Court was forced to focus its impact query on "an average jury" rather than on the particular jurors who sat in that case, because "[w]e of course do not know the jurors who sat." 395 U.S. at 254. In this case, the focus should be on Evans in particular rather than on an average defendant, because we of course do know Evans. We know him through the abundant evidence of his conduct, through his many sworn statements, and through the psychiatrist's evaluation of him.

appeals that he was entitled to a new hearing so that he could have another opportunity to present evidence of prejudice. Yet he chose not to ask that court to remand the case for such a hearing, and he conspicuously has not asked this Court to do so either.[11]

Instead, in spite of this Court's admonition in *Beck v. Washington*, 369 U.S. 541, 558 (1962), that unfairness must be shown "not as a matter of speculation but as a demonstrable reality," Evans has chosen to stake his position on speculative conjecture such as his guess that "there might have been other evidence that defense counsel could have presented." Brief for Respondent at 29. That Evans prefers pure conjecture instead of a new opportunity to present evidence is telling. Evans has not asked for a new habeas hearing because he knows that since the mere existence of the preclusion clause did not affect him in any way, anything added to the record would not be favorable to him.

D. Evans' Argument that He was Harmed And Prejudiced By the Preclusion Clause

1. Evans' "Instinctive Self-Preservation" Argument is Frivolous

On pp. 26-29 of his brief, Evans contends that the record does contain evidence that would have warranted a lesser offense instruction had it not been for the preclusion clause. Evans points to his grand jury statements that: he

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[11]The State's position is that Evans is not entitled to a new hearing. His habeas petition anticipated the *Beck* decision (A. 49-50), and he was free to offer any evidence of harm and prejudice at the hearing on it. Prior to that hearing, the district court ordered Evans to amend his petition "to aver each and every ground that [he] can conceivably think of that can be asserted under the conditions prevailing in this factual situation" (A. 55), but Evans still did not offer any proof that the preclusion clause had harmed or prejudiced him. *Cf., Wong Doo v. United States*, 265 U.S. 239 (1924) (Where "[t]he petitioner had full opportunity to offer proof of [a claim] at the hearing on the first petition," to reserve that proof for use in a later petition "was to make an abusive use of the writ of habeas corpus.").

never wanted to hurt anyone during a robbery unless he had to (A. 21); he thought the robbery victim, Mr. Nassar, was going for a gun and it had come down to a choice between Nassar's life and his (A. 19); and once he was confronted with that choice, well "that's pure instinct. That's self-preservation. I'm going to fire." (A. 19) Evans' argument that those statements create an intent to kill issue and justify a non-capital felony murder instruction is utter nonsense.

It is undisputed that Evans went into the pawn shop intending to kill Nassar if Nassar tried to defend himself. In the same answer where he made the instinctive self-preservation remarks, Evans told the grand jury that, "I was going to shoot him if he reached for a — a firearm, yeah." (A. 19) Ritter testified at trial that: "We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen." (Tr. 220) Evans testified that Nassar was not the first man he had killed (A. 21), and that he felt no remorse about the killing (A. 19, 42). Evans not only swore that he fully understood the consequences of his act when he shot Nassar (A. 19), but also swore that he would kill again in the same situation: "If I had to do it again, yeah, without a doubt." (A. 21)[12]

So, Evans' "instinctive self-preservation" argument reduces itself to the absurd proposition that there is no intent to kill if a robber deliberately murders the victim because he thinks the victim is trying to get a gun to defend himself. That argument should be rejected as frivolous. *See, e.g., Henson v. State*, 247 Ala. 125, 22 So. 2d 905 (1945) (claim of self-defense unavailable to one not free from fault in bringing about the difficulty); *Raines v. State*, 342 So. 2d 1348, 1357 (Ala. Cr. App. 1977) ("This has to be the most

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[12]Even if Evans had not formed the intent to kill until Nassar dropped down and started crawling away, under Alabama law premeditated intent to kill may be formed "the instant before the killing," *Daughdrill v. State*, 113 Ala. 7, 21 So. 378, 386 (1897), and need exist "only for a moment or instant of time," *Caldwell v. State*, 203 Ala. 412, 84 So. 272, 276-277 (1919). Evans has never contended that the gun fired accidently.

novel claim ever made in a robbery-murder charge."). If not rejected as frivolous, then it presents a question of state law that should be certified to the Alabama Supreme Court. Brief for Petitioners at 43.[13]

2. Evans' Parole Eligibility Argument Has No Basis in Fact

Evans argues on pp. 25-26 of his brief that had a lesser included offense option with attendant parole possibility been available, "Evans may well have made a very different choice as to how to proceed." Such unsupported speculation should be rejected for five reasons. First, it ignores the fact that there simply was no lesser offense evidence to present and therefore no possibility of presenting any.

Second, even if Evans could somehow have convinced the jury in this case that he lacked intent to kill, there was no chance at all that he ever would have gotten out of prison. The only lesser included offense possibility was a conviction for both felony murder and robbery, which would have meant one life sentence plus an additional sentence of ten years to life. Petitioner's Brief at 28-29 n. 23. Added to those two sentences would have been another Alabama sentence of 10 years to life for an unrelated non-capital robbery Evans had committed in Mobile after he

[13]On pp. 14 and 29 of his brief, Evans speculates on what would have happened if his instinctive self-preservation remarks "had been developed by competent counsel and presented at trial." The implication that Evans did not have competent counsel ignores the fact that his two experienced trial counsel (Tr. 6, 38, 49, 235-236) repeatedly urged him in vain not to follow the course of action that he did. (Tr. 72-73; A. 41-42) *Evans v. State*, 361 So. 2d 654, 661-662 (Ala. Cr. App. 1977) ("This Court specifically finds that both Evans and Ritter were fully, fairly, and thoroughly represented by these attorneys.").

In any event, no ethical attorney could have "developed" and presented evidence contrary to Evans' own persistent admissions that he intentionally killed Nassar, because an attorney may not participate in the creation of evidence "when he knows or it is obvious that the evidence is false," nor may he present false evidence. *Alabama Canons of Professional Responsibility*, DR 7-102(A)(4) and (A)(5).

robbed and murdered Nassar, and to which he had already pleaded guilty. (Tr. 69-71, 304-305, 326) In addition, Evans' Alabama sentences are only part of the sentences he would have received if Alabama had not sentenced him to death. During his cross-country crime spree Evans committed more than three dozen violent felonies in seven different states. (A. 39; Tr. 288-292, 321-330) After he was apprehended, Alabama authorities received warrants from at least four other states charging Evans with numerous counts of burglary, armed robbery, and kidnapping. (Tr. 233-234, 348-370) Those states and others indicated that they would prosecute Evans if he was not sentenced to death in Alabama. (Tr. 233-234) And of course Evans was a parole violator when the spree began. (Tr. 231-232, 238, 321) So, regardless of the verdict in this case there was never any chance that Evans would ever be released.

Third, even if Evans somehow could have been released after serving forty or fifty years, a tiny portion of all the many sentences he was due to receive, that would not have changed his course of conduct. Evans not only preferred death to the absence of any possibility of parole, he also preferred death to a long prison sentence. (A. 28); *Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977).

Fourth, Evans' contention that he might have acted differently if the preclusion clause had not foreclosed the possibility of parole fails to explain either the thrasonic nature of his behavior or the fact that he began his self-destructive legal strategy before he knew of the preclusion clause. Petitioner's Brief at 25-26.

Fifth, Evans' unsupported speculation about what might have happened if the preclusion clause had not existed is just that — unsupported speculation. Evans did not testify that he would have acted any differently, nor is he asking for another opportunity to present evidence on the issue.

3. The Burden of Proof is on Evans

Chapman v. California, 386 U.S. 18 (1967), held that where a constitutional violation is established the burden is

on the state to prove beyond a reasonable doubt the absence of harm. That rule is not applicable here because a constitutional violation has not been established.[14] Since harm and prejudice is an element of Evans' fundamental fairness due process claim, the burden is on him to prove harm and prejudice, Petitioners Brief at 30-33, especially since this is a habeas corpus case. *Id.*, at 35-36; *Rose v. Lundy*, 50 U.S.L.W. 4272, 4281-4282 (March 3, 1982) (dissenting opinion of Stevens, J.) (habeas corpus should not extend to any constitutional error, even that harmful enough to require reversal on direct appeal, unless the error rendered the trial fundamentally unfair).

In any event, even if the burden were somehow on the State, the record in this case proves, even beyond a reasonable doubt, that the preclusion clause did not harm or prejudice Evans.

II. EVANS' ARGUMENTS CONCERNING THE EFFECT OF HIS GUILTY PLEA SHOULD BE REJECTED

Evans' guilty plea is an independently adequate reason that his conviction is valid. Petitioner's Brief at 36-42. In *Lane v. State*, No. 80-803 (Ala., Feb. 5, 1982), pp. 1a-6a, *infra*, the Alabama Supreme Court held that a guilty plea to a capital charge, which must still be submitted to a jury pursuant to *Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979), is effective under Alabama law to waive all nonjurisdictional defects including any involving the preclusion clause. While the capital conviction in *Lane* did not result in a death sentence, the decision does authoritatively demonstrate that the court of appeals and

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[14] *Beck v. Alabama*, 447 U.S. 625 (1980), establishes a constitutional violation when lesser offense instructions which are supported by the evidence at trial are not given, but it did not hold that the mere existence of the preclusion clause was a constitutional violation in a case in which the clause did not apply.

Evans are wrong — a guilty plea to a capital charge *is* given waiver effect under Alabama law.[15]

Evans' argument that this case proceeded "just as though Evans had not pleaded not guilty," ignores the facts that a written guilty plea was admitted into evidence (A. 33-37; Tr. 252), and the Alabama Supreme Court held that the guilty plea rendered harmless and waived a defect in the jury instructions. *Ritter v. State*, 375 So. 2d 270, 276 (Ala. 1979). Nor is the fact that the Alabama appellate courts considered various constitutional issues in this case inconsistent with waiver of non-jurisdictional defects. Petitioner's Brief at 39 n. 34.

III. EVANS' SENTENCE IS VALID

Evans was not sentenced under a mandatory death penalty statute. See, p. 1, above. Even assuming that the jury verdict form requirement unconstitutionality tended to motivate the trial judge to impose a sentence of death, see pp. 1-2, above, Evans' death sentence is still valid because that error, if any, was harmless beyond a reasonable doubt in this case.

At every stage of the proceedings, Evans sought the death penalty. He expressed his desire to be sentenced to death even before he was captured (A. 20-22); to law

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[15]Footnote 1 of the *Lane* opinion, p. 2a, *infra*, reconciles that decision with *Ritter v. State*, 403 So. 2d 154 (Ala.), *vacated and remanded*, 102 S. Ct. 376, *on remand*, No. 77-798 (Ala. 1981), *certiorari pending*, No. 81-1600 (U.S., filed Feb. 27, 1982), by explaining that the Alabama Supreme Court is divided over whether a guilty plea waives all non-jurisdictional defects in a death case. The court is not divided on whether the state law waiver effect of a guilty plea in a capital case varies depending on the penalty — it does not. Instead, the court is divided on the federal issue of whether it violates the Constitution to give any guilty plea waiver effect in a death sentence case. That is why footnote 1 of the *Lane* opinion emphasizes that the Alabama Supreme Court's *Ritter* decision "was based on federal constitutional grounds."

The State's position is that since a guilty plea to a capital charge waives all non-jurisdictional defects as a matter of state law regardless of the penalty imposed, that waiver is constitutionally effective in both death and non-death cases.

enforcement officers after his arrest (Tr. 291); to the grand jury (A. 17, 20); to the trial jury (A. 38); and to the sentencing judge (A. 30, 38). After conducting a sentence hearing and finding that the aggravating circumstances "far outweigh[ed]" any mitigating circumstances, the judge complied with Evans' request that he be sentenced to death. (Tr. 241-242) Any other sentence was inconceivable, not only because Evans wanted the death penalty but also because he was remorseless (A. 41-42); he had killed before (A. 21, Tr. 232), and he said he would kill again (A. 21, 38). If the jury verdict form requirement was error, whatever effect it may have had on a judge's sentencing decision in some other case, it was harmless beyond a reasonable doubt in this unusual case. See p. 12, n. 10, above.

IV. THE CERTIFICATION QUESTIONS

If this Court agrees with the State that Evans' instinctive self-preservation argument is frivolous, see pp. 13-15, above, then it is clear that Evans would not have received any lesser included offense instructions regardless of the preclusion clause, and the first state law question discussed in Brief for Petitioners at 43 need not be certified. If this Court concludes that Evans' conviction is valid irrespective of what effect his guilty plea had, see pp. 17-18, above, then the second state law question discussed in Brief for Petitioners at 43 need not be certified. See Brief for Petitioners at 44 n. 37. Since Evans has apparently abandoned any state court claim he may have had that he was entitled to have his conviction or sentence invalidated as a matter of Alabama law, the third state law question, Brief for Petitioners at 44, clearly no longer needs be certified.

Evans' argument that it was inconsistent for the State to move for certification after it had conceded that he has no state remedies left to exhaust, Brief for Respondent at 37-39, is premised on the proposition that once a habeas petitioner has exhausted or forfeited his state remedies no important, unresolved state law questions can arise in a

subsequent federal habeas proceeding. This case illustrates that that proposition is absurd. The fact that a habeas petitioner can no longer have his federal claims ajudicated in state court does not in any way foreclose certification of state law issues or diminish its desirability.[16]

CONCLUSION

This Court should reject Evans' arguments and reverse the court of appeals.

Respectfully submitted,

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of Alabama

Dated: March 12, 1982

[16]Evans' cynicism above the motives of the attorneys for the State in moving for certification, Brief for Respondent at 37-39, is not only unjustified but is also particularly unbecoming since the district court found that it was Evans' attorneys — not the attorneys for the State — who had "trifled with the law" and engaged in actions that were "extremely borderline at best on ethical practice." (R. 44-48)

APPENDIX A

February 5, 1982

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1981-82

Ex parte State of Alabama

Petition for Writ of Certiorari
to the Court of Criminal Appeals

(Re: Homer Lawrence Lane
v.
State of Alabama)

80-803

MADDOX, JUSTICE.

The sole issue in this case is whether a defendant who entered a plea of guilty to a capital offense, and who was sentenced to life without parole, is entitled to withdraw that plea of guilty and obtain a new trial in light of *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); on remand, *Beck v. State*, 396 So. 2d 645 (Ala. 1981) (wherein the Court held that the constitutionally infirm clause in Alabama's death penalty statute, which precluded trial judges from giving lesser included offense instructions in capital cases, could be severed from the death penalty statute).

When the state filed its petition for certiorari in this Court, there was pending here a case which presented the same issue. The case was *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980); cert. quashed 403 So. 2d 286 (Ala. 1981). In *Graham*, the Court of Criminal Appeals upheld the conviction. In this case, a majority of the Court of Criminal Appeals reversed Lane's conviction on "mandate of the Supreme Court of Alabama in *Ritter v. State* [403 So. 2d 154

(Ala. 1981)] and authorities therein cited, and *Ricardo Cook v. State*, MS. 6 Div. 461, this day decided. . . ."

In *Ricardo Cook v. State*, [MS. 6 Div. 561, June 23, 1981], ___ So. 2d ___ (1981), a majority of the judges of the Court of Criminal Appeals were of the opinion that ". . . every pre-*Beck* death case must be reversed, regardless of the lack of evidence on lesser offenses." In reaching this conclusion, the Court of Criminal Appeals has misapplied the law announced by this Court in *Beck* and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981), and has failed to apply the principles of law set forth in *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981).

This Court did not write an opinion in *Graham*, but the rationale upon which the judgment to quash the writ was based in *Graham* was that a plea of guilty voluntarily made in a case wherein the death penalty was not imposed waives all non-jurisdictional defects.[1]

What was the effect of Lane's plea of guilty which was voluntarily made and upon which his judgment of conviction was based and upon which he was sentenced to life imprisonment without parole?

One of the most basic principles of the criminal law was stated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 23 L. Ed. 2d 274 (1969), where the Supreme Court opined:

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[1]There is disagreement on this Court on whether a plea of guilty in a capital case *when the death penalty is imposed* also waives all non-jurisdictional defects. See dissenting opinion in *Ritter v. State*, 403 So. 2d at p. 155. The Supreme Court of the United States has agreed to review the *Ritter* case. Certiorari was granted by the United States Supreme Court on October 15, 1981, 50 USLW 3277; and that case was remanded to us for further consideration in light of *Reed v. State*, on October 26, 1981; answer of this Court on remand from the United States Supreme Court dated December 11, 1981, held that the decision in *Ritter* was based on federal constitutional grounds. ___ So. 2d ___ (1981).

> "... A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. ..."

395 U.S. 238, 242, 23 L. Ed. 2d 274, 279.

It is universally held that a voluntary plea of guilty waives all non-jurisdictional defects. *Lancaster v. State*, 362 So. 2d 271 (Ala. Crim. App. 1978), cert. den. 362 So. 2d 272 (1978); *Franklin v. United States*, 589 F. 2d 192, 194, 195 (5th Cir. 1979), cert. den. 441 U.S. 950, 99 S. Ct. 2177, 60 L. Ed. 2d 1055.

The factual setting in this case is not dissimilar to the fact situation in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). *Brady* involved the Federal Kidnapping Statute which provided that only a jury could set a death penalty. Brady, charged under the Act, sought to avoid the death penalty, first, by waiving trial by jury and, when that was disallowed, by pleading guilty. The Supreme Court of the United States, a few years later, in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), invalidated and severed the death penalty provision from the Federal Kidnapping Statute on the grounds that it tended to coerce defendants into waiving trial by jury or to plead guilty. When Brady was sentenced under the Federal Kidnapping Statute upon his plea of guilty, the Supreme Court of the United States had not invalidated the death penalty provision from the statute. The Court refused to set aside Brady's conviction. The Court opined:

> "It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty

provision of [the federal kidnapping statute], this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."

397 U.S. 742, 749-750, 25 L. Ed. 2d 747, 757.
The Court added:

"It is true that Brady's counsel advised him that [the federal kidnapping statute] empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson, supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court and there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

"Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, *cf., Von Moltke v.*

Gillies, 332 U.S. 708, 92 L. Ed. 309, 68 S. Ct. 376 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

"The fact that Brady did not anticipate *United States v. Jackson*, supra, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the state would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions."

397 U.S. 742, 756-757, 25 L. Ed. 2d 747, 761.

In reaching the conclusion we reach in this case, we have considered the fact that the record indicates that Lane contended in his first petition for writ of error coram nobis that he had a defense of alibi. *Lane v. State*, 7 Div. 700 (Ala. Crim. App. 1979), cert. den. 386 So. 2d 216 (Ala. 1979).

The decision of the Court of Criminal Appeals conflicts with this Court's decision in *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981). It is due to be reversed and the cause remanded to

that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Tobert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.